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FTC AUTHORIZATIONS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSUMER

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

FEDERAL TRADE COMMISSION AUTHORIZATIONS

FEBRUARY 4 AND 5, 1987

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AUTHORIZATION OF THE FTC

WEDNESDAY, FEBRUARY 4, 1987

U.S. SENATE
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON THE CONSUMER
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:18 a.m. in Room SR-253, Russell Senate Office Building, Hon. Albert Gore, Jr. [Chairman of the subcommittee] presiding.

Staff members assigned to these hearings: Amy Bondurant and Thurgood Marshall, Jr., staff counsels; and Chuck Harwood, minority staff counsel

OPENING STATEMENT BY SENATOR GORE

Senator GORE. Ladies and gentlemen, this hearing will come to order. I would like to begin by apologizing to our witnesses and guests for the short delay in beginning the hearing. I was making a speech downtown at a gathering where there were many speakers, and the gathering was disrupted by a group that turned over tables and stormed the dais with a bullhorn and signs. Anyway, what a way to start the morning. It threw the schedule off there, and that in turn threw our schedule off. So I hope no one has an urge to overturn tables here or at least that they will contain that urge if they do.

Today and tomorrow, the Consumer Subcommittee will conduct hearings to examine the activities and authority of the Federal Trade Commission. These hearings, of course, will focus on the reauthorization of the agency. The agency has been without an authorization for more than four years, since October 1982.

Since the end of the last authorization period, the Commerce Committee has reported three authorization bills. The bill most recently reported by the committee, S. 1078, passed the full Senate; however, issues involving the extent of the agency's substantive authority failed to be resolved in the conference, and the legislation did not become law. These issues, including the extent of authority the agency should have to regulate advertising and the agency's authority over agricultural cooperatives, will be addressed by witnesses today and tomorrow.

We will also hear from witnesses discussing whether or not the FTC should have authority to investigate insurance issues.

Now, while the hearings will focus on reauthorization issues with an eye toward legislation, witnesses are encouraged to address whether the FTC has vigorously enforced this nation's antitrust and consumer protection laws. We are also interested in the work of the economic activities mission at the agency and in agency interventions before other government entities. In other words, we are interested in addressing reauthorization issues while laying the foundation for later oversight hearings.

The FTC is important to consumers and businesses alike. Whether it enforces the law and whether it effectively sets priorities has a major impact on both the state of competition in America's marketplace and on the economic well being of the nation's consumers. So I look forward to today's hearings.

Our first witness will be FTC Chairman Daniel Oliver, but before hearing from him, I would like to express my personal pleasure in having the opportunity to serve with the ranking minority member on this subcommittee, Senator John McCain. We were friends and colleagues in the House together, and as freshmen Senators we are going to do our best on this subcommittee. I would like to recognize him at this time.

OPENING STATEMENT BY SENATOR McCAIN

Senator McCain. Thank you very much, Mr. Chairman. I appreciate your kind words of welcome. I know you will attack these very difficult issues with the enthusiasm and indepth efforts that have characterized your efforts on other issues.

Mr. Chairman, I would just like to make a very brief statement regarding the issues involved in the reauthorization of the Federal Trade Commission. These issues are relatively new to me, but I have learned already that they are frequently complex and that the debate on them is often based more on emotion at times than reason; therefore, again I congratulate you for your willingness to tackle these hearings so early in your tenure as Chairman of the Consumer Subcommittee.

In the process of arguing about the fine points of the FTC Act, it is possible to forget about what the FTC means to our constituents. In Arizona, for instance, which has a large senior population, health fraud, drug pricing, credit discrimination and health care regulation are of great importance. Moreover, businessmen, too, benefit from the FTC activities, such as those that increase competition and exclude unscrupulous competitors from the marketplace.

Unfortunately, the FTC has not been authorized since 1982. I do not mean to sound like an overconfident rookie, Mr. Chairman, but I am optimistic that the FTC can be reauthorized during this Congress, and I am sure your very good relations with members of the House will help in seeing that this happens.

A consensus on FTC authorization legislation was nearly reached last year, a feat for which the former chairman of this subcommittee, Senator Kasten, deserves much of the credit. By using this near consensus as the basis for our reauthorization effort, I think we can count on success.

I thank you, Mr. Chairman.

Senator GORE. Thank you. I share your view, and one of the reasons why we are beginning the authorization hearings so early in this year is the hope that by starting early and building up a head of steam and building upon the work of last year's chairman, we can actually get an authorization bill through. I hope that is not a vain hope. I hope that it is a realistic effort.

In that effort, we are fortunate to have the help of a veteran of this subcommittee whose experience will be invaluable to us, Senator Kasten.

OPENING STATEMENT BY SENATOR KASTEN

Senator KASTEN. Mr. Chairman, thank you very much. In the past six years, important changes have occurred regarding the Federal Trade Commission. At the agency itself, we have seen the development of an open door policy, resulting in what I think is far better communications between the FTC and those subject to its authority.

In this same vein, the agency has made an effort to explain and define what is legal and what is illegal using terms and definitions that are understandable to consumers and businessmen, not just to lawyers. The agency has also focused its activities to a much greater extent on those areas of consumer protection and antitrust law that it is best able to police, those areas in which it is best able to make a difference.

Unfortunately, there is still much to criticize about the FTC, but I think that part of the blame, frankly, for this continuing criticism ought to fall on us, on Congress, for our failure to pass an FTC authorization bill.

In 1981 and then again in 1982, there was, frankly, little agreement even on our committee about what should be done to address the Federal Trade Commission. It involved a contentious set of issues, going back to the legislative history, even before 1980.

By 1985, it was possible, first of all, for the Commerce Committee to reach a consensus. The FTC reauthorization bill, Mr. Chairman, came out with a unanimous vote which was practically unheard of in previous years. Then we went on to approve the FTC authorization bill, S. 1078, by a vote of 84 to 5 on the floor of the Senate. Unfortunately, the House-passed version of S. 1078 contained some important differences which made it impossible to complete conference action on the bill.

I believe, Mr. Chairman, that had we gotten an earlier start and spent more time in conference that we would have been successful in working out the few differences that we had. Even some of the differences between the two bills were resolved by the end of last year. I would hope that finally during this session, especially with this early start, we are going to be successful, and the Federal Trade Commission will be reauthorized.

Among the unresolved differences between last year's Senate and House FTC authorization bills was the scope of the FTC's rulemaking authority over commercial advertising. This issue has a long history on this committee, and it was only resolved with very great difficulty, with both sides giving.

During the next two days we will hear testimony favoring no restrictions and testimony supporting greater restrictions on the FTC's rulemaking authority over advertising. Among these options, my preference would likely be for greater restrictions; however, a compromise has been developed in this area, and I would urge the committee to listen carefully and then to think carefully as we try to work once more to develop compromises which would enable us to have the strong support, at least in the Senate, in the Commerce Committee and on the floor, on a number of these important issues.

Mr. Chairman, I look forward to working with you not only in these hearings but throughout the term of your chairmanship of this important subcommittee.

Senator GORE. Thank you very much. I might just say that my preference is for fewer restrictions, but I share your view that compromise is essential, and I am going to be interested to hear from all the witnesses their views on whether or not that is a correct judgment. Is the need to get reauthorization more important than refighting some of those battles that we referred to?

Senator Hollings has another commitment but I have an opening statement from him to include in the record.

[The statement follows:]

OPENING STATEMENT BY THE CHAIRMAN

Mr. Chairman, I am pleased the Consumer Subcommittee is off to an early start in this Congress on the issue of reauthorizing the Federal Trade Commission.

The last formal authorization of the FTC to become law was the FTC Improvements Act of 1980. Although this Committee approved authorization legislation in both the 98th and 99th Congresses, those efforts failed to become law. As a result, the FTC has operated without an authorization since the 1980 law expired in 1982.

It is vital that this Committee and the Congress proceed with the expeditious authorization of the FTC. The failure to do so over the past few years has fueled questions about the continuing viability of the agency's mission as the "cop on the beat" protecting the American public from deceptive practices and protecting American businesses from unfair methods of competition.

Since its creation, the FTC has had an important mandate to insure that businesses deal fairly not just with consumers but also with other businesses in a freely competitive environment. To that end, the Commission is charged with protecting against unfair, deceptive, or anti-competitive practices.

The FTC and the laws it enforces were created for reasons which are as compelling now as they have ever been. Historically, the agency's mere existence has had a deterrent effect on practices illegal under the antitrust laws, such as predatory pricing. But I am concerned that this may no longer be true. These hearings will address this issue as well as the FTC's authority over advertising and agricultural cooperatives, and its authority to study insurance issues. We will also examine the judgment of the agency in committing its resources and in setting its enforcement priorities.

I appreciate the efforts of our witnesses. I intend to work closely with Chairman Gore and the members of the Consumer Subcommittee on this important authorization.

Senator GORE. Well, our first witness is the Chairman of the Commission, the Honorable Daniel Oliver. He is accompanied by all other members of the Commission, two of whom have prepared statements of their own which we will ask them to summarize, and we will begin at this time with Chairman Oliver. Your entire statement will

be included in the record. You are invited to present it or summarize it as you see fit.

We are delighted to welcome all of you, and let me say a personal word of welcome to Commissioner Calvani, who was a personal friend for a long time in Nashville, Tennessee.

Chairman Oliver, please proceed with your statement.

STATEMENT OF HON. DANIEL OLIVER, CHAIRMAN, FEDERAL TRADE COMMISSION; ACCOMPANIED BY PATRICIA P. BAILEY; TERRY CALVANI; MARY L. AZCUENAGA; AND ANDREW J. STRENIO, JR., COMMISSIONERS

Mr. OLIVER. Thank you, Mr. Chairman. Would it be appropriate for me to introduce the other Commissioners?

Senator GORE. Please do.

Mr. OLIVER. You recognize Commissioner Calvani. I will introduce them in reverse order of seniority, which some people are apparently unaware is the way we vote at our meetings: Commissioner Strenio on my left, Commissioner Azcuenaga on my right, Commissioner Calvani, I have already introduced, and Commissioner Bailey on my near right.

It is a pleasure and a privilege to be here. I would like to read my statement, if I may, because it is a statement of the Commission and received unanimous approval by the Commissioners, although there are some parts that individual commissioners may not, do not, I think, agree with. But it does reflect a Commission position. If I may, I would like to read the statement.

Mr. Chairman and members of the subcommittee, I am pleased to be here today to present these views of the Federal Trade Commission on reauthorization. We believe it would be useful to resolve the reauthorization question which has now been pending before Congress since our last authorization expired in 1982. We came close to resolving these issues in the 99th Congress. It is now time to end this uncertainty so the Commission can get on with its important activities on behalf of American consumers.

We urge the subcommittee to report out an FTC reauthorization package patterned after the bill, S. 1078, that the Senate passed during the last Congress on July 26, 1985. As you know, this bill was similar in many respects to that approved by the House on September 17, 1985.

I would like to outline briefly my position on each of the major provisions of the reauthorization package. Where pertinent, I will note the disagreements between the Senate and the House versions and also summarize briefly the reasons for my preference for one version or the other.

I also note that this statement reflects the views of the full Commission. I hasten to add that individual commissioners do not necessarily endorse all the positions described here, but what I describe as the Commission's position is majority view in each case.

First, we support the provision in the Senate bill that modifies the existing statutory treatment of Commission cease and desist orders subject to an appeal. Currently, these orders are stayed automatically whenever they are appealed. S. 1078 would adopt a more sensible rule, one that resembles more nearly the treatment accorded Federal District Court orders that are appealed. The Senate's version would, among other effects, limit substantially the existing incentives of respondents to slow down the appeal process.

Second, we support the Senate and House bills' codification of the Braswell standard for knowing violations of litigated FTC orders. As you know, under Section 5(m) of the Federal Trade Commission Act, once the Commission determines in an adjudicative proceeding that a certain act is unfair or deceptive, it may secure civil penalties against any person, even someone not a party to the original proceeding, who engages in the act with actual knowledge of the Commission's earlier ruling that it is unlawful.

Braswell held that a person who is not a party to the original proceeding could challenge the legal conclusion that the act was unfair or deceptive. This was the interpretation of Section 5(m) agreed to by the Commission in that case, and we support codification of that holding as provided in the Senate bill.

We also support a legislative definition of unfair acts or practices embodying the standards contained in the Commission's December 1980 unfairness protocol. We support S. 1078's definition of an unfair act or practice as one that causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.

We further support language contained in both bills clarifying the factual showing necessary before the Commission undertakes rulemaking proceedings. We therefore urge this subcommittee to adopt the provision requiring that the business practices upon which a rulemaking would be based be prevalent before initiating any rulemaking proceeding. This is, in fact, the standard currently employed by the Commission.

We also have no objection to the provision of S. 1078 that would remove the Commission's authority to promulgate industrywide rules governing advertising under the unfairness standard. The Commission's experience in this area suggests that rulemaking may infrequently be a useful enforcement mechanism for addressing unfair advertising.

Although rulemaking based on unfairness may be appropriate on occasion, the broad scope of the unfairness standard may render its use in rulemaking more cumbersome and imprecise than is true of case-by-case enforcement actions. We note that the Senate bill would retain Commission authority to bring individual enforcement actions involving advertising under the unfairness standard.

We also support S. 1078's repeal of the Commission's public participation authority. In theory, the original provision permitted the Commission to fund certain costs of participants in FTC rulemaking

proceedings. Congress has not appropriated funds for this purpose since 1980. The House bill omits this provision.

Also in connection with FTC rulemaking, we do not oppose a constitutional version of the legislative veto that holds in abeyance any new FTC rule pending review by Congress and implements expedited procedures for consideration of a joint veto resolution by Congress.

We also do not oppose the provision of S. 1078 that would make permanent the 1980 Improvements Act's limitation on the Commission's authority over trademarks. The existing restriction precludes the FTC from taking action to cancel the trademark's registration on the grounds that it has become a common or generic descriptive term. The House bill contains no such provision. We believe the Senate bill's approach to be preferable because competitors have an adequate incentive to challenge trademarks that have become generic, and no government action is required.

We also have no objection to the provision of S. 1078 that would add Federally chartered credit unions to the existing group of financial institutions not now subject to Federal Trade Commission authority. We generally oppose exemptions from the antitrust and other consumer protection laws. Federally chartered banks and savings and loans as well as credit unions are subject to extensive regulation by Federal agencies and departments other than the Federal Trade Commission. Only Federal credit unions, however, remain subject to the FTC's duplicative jurisdiction.

Under these circumstances, it would seem appropriate to remove the FTC's overlapping authority over this one remaining type of financial institution. S. 1078 would make consistent the Federal regulatory treatment of all financial institutions. Under these circumstances, we cannot readily think of an argument supporting special FTC authority over this one type of financial institution.

Next, we oppose any provision that would place restrictions on the Commission's ability to serve as the consumer's advocate before courts or other governmental entities. Although not found in the Senate bill, the House version would require advance notification to the relevant Congressional committees before the Commission could take any position as an intervenor before another regulatory body.

We do not believe a need exists for this additional recordkeeping requirement. Shortly after I became Chairman, I directed that all FTC advocacy comments be forwarded to Congress promptly. Since then, our regular practice has been to forward copies to all interested committees and staff. This existing procedure would seem preferable to that set forth in the House bill, particularly in light of the fact that the time the Commission has to prepare and submit comments often is shorter than the 60 days H.R. 2385 would have set as the standard amount of advance notice to Congress.

I now turn to reauthorization issues that affect more directly the Commission's antitrust enforcement program. We have no objection to S. 1078's provision requiring the Commission to submit a semiannual report on its resale price maintenance enforcement efforts. We recog-

nize Congress' need to obtain information so as to be able to conduct meaningful oversight of Commission activities. We question, however, whether it is necessary to require submission of a routine report in the enabling legislation, particularly because preparation of such a report will entail an unknown expenditure of Commission resources.

Next, we do not oppose the Senate bill's requirement that the FTC consult with the Secretary of Agriculture in cases involving agricultural cooperatives. We consider this language preferable to the House bill's more restrictive language. We strongly oppose, however, the Senate bill's continuation of the existing limitation on the FTC's ability to study and investigate the effect on the American consumer of actions taken by agricultural cooperatives.

As an aside, I note that S. 1078's inclusion of prosecution in the list of banned activities is superfluous. The Commission cannot now prohibit anticompetitive conduct that is immunized by the Capper-Volstead Act.

As I have noted, we object to special interest exemptions from the nation's antitrust and other consumer protection laws. The Commission's professional staff of economists and lawyers is well situated to analyze the competitive effects of agricultural cooperatives and to make recommendations as appropriate to the Congress and others. This restriction therefore seems especially unwise. This subcommittee would serve the American consumer well by deleting them.

Past bills have addressed the issue of exemptions for professions and the related question of state action immunity. It is our understanding that those concerns have been laid to rest and that present proposals do not address those issues.

Turning to a procedural issue, we support S. 1078's adoption of the Civil Investigative Demand as the investigatory tool to be used in the Commission's antitrust inquiries. The CID is currently used by both the antitrust division of the Department of Justice and by the Commission's Bureau of Consumer Protection in nonantitrust investigations. Its features, on balance, make it a preferable tool for all antitrust enforcers as well.

With your permission, Mr. Chairman, I would like to address another legislative provision not raised expressly by either the Senate or the House bill. I refer to the limitation in the Federal Trade Commission Act on the Commission's ability to study the business of insurance.

The FTC Act now precludes the Commission from conducting studies or preparing reports concerning insurance unless a majority of the members of the Senate or House Commerce Committees so request. Moreover, the authority to conduct any such requested study expires with the Congress during which the request is made.

The principal reason for the FTC's creation was to serve as a body of experts on important issues of commerce that affect American consumers. To discharge that duty, the Commission has over the years assembled a highly trained staff of economists, accountants, lawyers and other professionals.

No one can deny that the insurance industry is a vital one for virtually all Americans, and yet Congress has by law imposed sharp limits on our ability to analyze that industry. The Commission is not so restricted with respect to other industries. We see no reason for continuing it with respect to the business of insurance. We therefore urge the subcommittee to report out a bill that deletes this anticonsumer limitation.

For the purpose of authorizing the Commission's funds, we support the administration's proposed figure of $69.85 million for Fiscal Year 1988.

Mr. Chairman, that concludes my prepared statement. I would be pleased to address any questions that you or other members of this committee might have.

Senator GORE. Thank you very much.

Senator John Breaux has joined us and is invited to make any opening statement he might care to.

Senator BREAUX. I am here to listen and learn, Mr. Chairman.

Senator GORE. Thank you very much. We will hold our questions. Commissioner Calvani, your entire prepared statement will be included in the record, and you are invited to summarize it if you can. If you prefer to present it, we will give you that opportunity.

Mr. CALVANI. Mr. Chairman, I will be brief. I am delighted to be here this morning to visit with you folks about the reauthorization of the Commission. I know that you and all the members of the Committee are all very busy people. I look in the room behind me and it is filled with friends and distinguished individuals. I notice our mutual attorney general, the Honorable Mike Cody, people like Kathleen McDermott and Bruce Silverglade. These people need time to talk too, so I would simply like to submit my prepared statement for the record after having made just one point.

If you look at my prepared remarks, they begin with Bismarck's observation that those who are fond of sausage and legislation should never see either one being made, and although I have not been in this town for very long, Bismarck's observation seems to me to be an apt chracterization of the efforts to obtain reauthorization of the Federal Trade Commission during recent sessions of Congress.

The bills passed by both the House and the Senate during the 99th Congress are veritable Christmas trees of ornanents reflecting myriad special interests. Perhaps that is not unusual. Maybe that is not wholly alien to the legislative process. Despite these introductory remarks, let me be quite clear so that there is no misunderstanding about my own views. I support both S. 1078 and H.R. 2385 as they emerged from the Congress. I would prefer the Senate version, but either is acceptable. It is simply time to reauthorize the Federal Trade Commission. The bills passed in the 99th Congress are not perfect, but legislation seldom is. I fear that efforts to further refine the proposed legislation will result in a continuation of the status quo. That means simply lack of authorization. The most recent bills reflect many compromises that I suspect, if we look around this room and we ask most of the people here, I suspect

that most all of us are not totally happy. They represent compromises. But I am convinced personally that further effort will not likely produce improvements, and I shudder to think of all the time that Ms. Bondurant and her staff have devoted to the subject of reauthorization.

Mr. Chairman and members of the Committee, it is time to get the show on the road, and I would be happy to answer any questions that you might have.

[The statement follows:]

STATEMENT OF TERRY CALVANI, COMMISSIONER, FEDERAL TRADE COMMISSION

Mr. Chairman and Members of the Subcommittee: I am pleased to be here to present my views concerning reauthorization of the Federal Trade Commission.

Bismark once said that those who are fond of sausage or legislation should never watch either being made. Although my tenure on the banks of the Potomac has been a short one, Bismark's observation is an apt characterization of the efforts to obtain reauthorization of the Federal Trade Commission during recent sessions of the Congress. The bills passed by both the House and Senate during the 99th Congress are veritable "Christmas trees" of ornaments reflecting myriad special interests. But, perhaps, that is not wholly alien to the legislative process.

Despite these introductory remarks, let me be quite clear lest there be any misunderstanding: I support both S. 1078 and H.R. 2385. I would prefer the Senate version—but either is acceptable. It is time to reauthorize the Federal Trade Commission. The bills passed in the 99th Congress are not perfect, but legislation seldom is. I fear that efforts to further refine the proposed legislation will result in the continuation of the status quo—lack of authorization. The most recent bills reflect many compromises that I suspect none of us in this room are totally happy with. But I am convinced that further effort will not likely produce improvements. It is time to "get the show on the road." Allow me, Mr. Chairman, to address the various provisions of the Senate and House reauthorization bills passed during the 99th Congress.

First, I support the amendments proposed by both Houses of Congress to Section 5(m) of the FTC Act. The law now gives the Commission authority to seek civil penalties against one company for knowing violation of an order entered against a different company. The first proposed revision would clarify that only litigated cease and desist orders, and not consent agreements, may provide the basis for nonrespondent liability under 5(m)(1)(B). I agree that where the legal and factual issues arising in a 5(m)(1)(B) action have not been subject to a full adjudication in the predicate proceeding, it is unfair and unsound to seek civil penalties of a nonrespondent. The Commission has long adhered to the position that 5(m)(1)(B) was never intended to allow a civil penalty action against Company B based on a consent order against Company A. The proposed amendment would merely codify that position.

I also support the proposed amendment to clarify that a court in a 5(m)(1)(B) civil penalty action may review the legal determinations (that an act or practice was unfair or deceptive under section 5(a)(1) of the FTC Act) made by the Commission in issuing the order that provides the basis for the civil penalty action. As you know, and as Chairman Oliver has pointed out, this provision would codify the federal district court's decision in United States v. Braswell, Inc., 1981-2 Trade Cas. (CCH) §64,325 (N.D. Ga. 1981), aff'd No. 81-9666 (11th Cir. Mar. 3, 1982). I agree that due process problems would be presented were 5(m)(1)(B) defendants denied the opportunity to challenge the FTC's findings in the predicate adjudication.

Second, I support a proposal to amend Section 18 of the FTC Act to require that the Commission have reason to believe that unfair or deceptive acts or practices are "prevalent" before issuing a notice of proposed rulemaking. A rule usually imposes costs on firms behaving legally as well as those behaving illegally. Thus, I believe that promulgation of a rule is only desirable when a practice is so widespread that case-by-case enforcement is either inefficient or ineffective. Incorporation of a "prevalence" standard into the statute is therefore sound.

Third, I support the proposal in the Senate bill to end the present automatic stay imposed upon Commission cease-and-desist orders pending appeal and to make Commission orders that have been appealed (with proper exceptions) effective after 60 days unless a stay is granted by the Commission or a court. Presently, as you know, the effective date of a Commission order must await final resolution of any appeal. The problem presented by the status quo is that a respondent now, as a matter of right, may continue to engage in conduct which the Commission has determined to be unlawful, perhaps even for years during the pendency of an appeal. Where the benefits of perpetuating their illegal behavior during the pendency of an appeal outweigh the costs of continued litigation, respondents are given an incentive to file petitions for review for the sole purpose of effecting delay. The amendment would reduce that perverse incentive.

In addition, I can see no reason to delay the effective date of an entire order, when often only certain provisions of an order are challenged. In requiring respondents to obtain a stay, the proposed amendment would allow the Commission and the courts to use their discretion to put into effect those provisions of an order that are not challenged on appeal. In sum, I see no reason why Commission orders should be subject to different criteria for finality than court orders, or orders of other federal agencies, particularly where public injury may be substantial as a result.

Fourth, I support incorporation of the Commission's "unfairness" standard into Section 5 of the FTC Act. The standard is a sound one and should not be subject to change by future Commissions. I am, however, opposed to the language in the House bill providing that any unfairness determination must take into account whether an act or practice "violates any public policy." The House language is at best vague and confusing and at worst would spawn decisions that pay little deference to the appropriate unfairness standard the House bill otherwise purports to embrace.

Fifth, I support the proposed extension of the use of Civil Investigative Demands to Commission antitrust investigations, which would provide uniformity in procedure without depriving the Commission of its current investigatory powers.

Sixth, I support repeal of Section 18(h) of the Federal Trade Commission Act, the Commission's authority to provide compensation for attorneys fees and other costs to participants in Section 18 trade regulation rulemakings. The program has lain dormant for years without Congressional funding, and now is appropriately put to rest.

Seventh, I endorse the proposed exemption of federal credit unions from Commission jurisdiction for the reason that federal credit unions, like other financial institutions already exempt from Commission jurisdiction, are subject to substantial regulation by other federal agencies. As Chairman Oliver has pointed out, duplicative regulation is inefficient and unnecessary.

Finally, I am not opposed to the suggested permanent prohibition on action by the Commission under the Lanham Act to cancel a trademark registration on the ground that a mark has become a common descriptive name. In many circumstances, private enforcement incentives are a fully adequate substitute for Commission involvement.

There are several provisions of the House and Senate bills which are less appealing, but which I am willing to support in the spirit of compromise in order to obtain reauthorization.

First, the provision contained in the House bill that would require the Commission to notify the Congress prior to each and every intervention before any Federal or State agency appears to me to be both unduly burdensome for the Commission and unnecessary for the Congress. Many Commission interventions are completed under extreme time pressure, and the proposed reporting requirement could hinder or even preclude the filing of a significant number of pro-consumer comments. The important need of the Congress for oversight of the expenditure of Commission resources can be more effectively accomplished through oversight and appropriations hearings, Congressional requests for information through customary channels, and the forwarding of comments to Congress subsequent to their preparation.

Second, I am opposed to the provision in both the House and Senate bills that would permanently preclude even the study of agricultural cooperatives and agricultural marketing orders by the Commission. Like the current statutory limitation on the Commission's power to study the insurance industry, this special interest exemption of agricultural cooperatives from any and all FTC attention is a mistake. Excluding

important sectors of the United States economy from scrutiny by a federal body that has substantial expertise in economics and trade regulation deprives both citizens and lawmakers of useful, even critical, information.

Third, I have reservations about the provision of the Senate bill that would prohibit the regulation of commercial advertising through an unfairness rulemaking, for the reason that it singles out advertising from among other acts and practices. Perhaps unfairness rulemaking is unwise as applied to any commercial act or practice. Until that determination is made, however, I question exemptions from unfairness rulemaking for those engaged in a particular industry.

Fourth, I recommend against the language in the Senate bill explicitly denying the Commission antitrust jurisdiction where "state action" is involved. The judicially formulated "state action" exemption, predicated upon the Tenth and Eleventh Amendments to the Constitution, already deprives the Commission of jurisdiction over unfair methods of competition that amount to state action. Inclusion of such a provision in the FTC Act would only serve to confuse "state action" law. Why prohibit by legislation that which is already prohibited by the United States Constitution?

Fifth, although I have no objection to providing the Congress with reports on Commission enforcement efforts respecting resale price maintenance and predatory pricing, I view the proposed requirements for their submission to be a waste of Commission resources and hence the taxpayers' money. Illegal resale price maintenance is rare owing to several factors. The first is the ability of sellers to fix resale prices in a perfectly legal manner under the Colgate doctrine (United States *v.* Colgate & Co., 250 U.S. 300 (1919)), as more recently expounded by the Supreme Court in the Monsanto case. Monsanto Co. *v.* Spray-Rite Service Corp., 465 U.S. 752 (1984). Second, sellers may accomplish many of the same results attainable under resale price maintenance, now per se illegal, through non-price vertical restraints, which are scrutinized under the much more accommodating rule of reason. See Continental T.V., Inc. *v.* GTE Sylvania, Inc., 433 U.S. 36 (1977). Third, unlike horizontal price fixing, which is necessarily covert, vertical price fixing is necessarily overt, thus inviting public scrutiny and private litigation.

Equally rare is "predatory pricing." Both the empirical and theoretical literature, as well as the case law, show that below cost pricing to exclude rivals is rare at best. I thus view both of these reporting provisions as akin to requiring expenditure of tax dollars for drafting a report to the Congress on unicorn sightings.

Finally, Mr. Chairman, I would like to explain my views on the legislative veto debate. From the Commission's perspective, resolution of the legislative veto provision one way or the other appears to me to be relatively unimportant. This is because the tensions between Congressional oversight and delegation of authority are similarly present under either scenario. Without a legislative veto, Congress would be less willing to delegate power to the Commission; with a legislative veto, Congress would be more willing to delegate. The tensions between delegation and oversight existing in either case will produce roughly the same result.

In any event, it makes little sense to me to enact a special legislative veto for the FTC. I believe that the better way to proceed is through one general piece of legislation rather than through a series of agency-specific bills. In conclusion, let me reiterate that while I cannot wholeheartedly endorse some of the specific provisions in the House and Senate bills passed during the last Congress, I do support the bills in their totality. Their imperfections are an acceptable price to pay for speedy reauthorization.

Mr. Chairman, this concludes my small contribution to the legislative meat grinder, and I will now be pleased to answer any questions that you or other Subcommittee Members may have.

[The following information was subsequently received for the record:]

FEDERAL TRADE COMMISSION,
Washington, DC, February 19, 1987.

HON. ALBERT GORE, JR.
Chairman, Subcommittee on the Consumer Committee on Commerce, Science, and Transporrtation U.S. Senate Washington, DC. 20510

DEAR SENATOR GORE; I submit this letter for the rcord of the FTC reauthorization hearings held by the Consumer Subcommittee on February 4-5, 1987. During the hearing, Senator Breaux posed an important question concerning "predatory pricing." You graciously agreed to hold the record open for a written submission more fully explaining my answer to Senator Breaux's inquiry. This letter constitutes my response.

Citing the persistent complaints of small businessmen, Senator Breaux questioned my contention that predatory pricing is rare. Given those complaints his doubts are understandable, and he is not alone in holding them. I nevertheless maintain that predatory pricing is, if not a "unicorn," at least a "white tiger" in the world of anti-competitive business practices.

The truth that below-cost pricing to exclude rivals is rarely employed by businessmen and even more rarely successful has been established by theoretical analysis and empirical evidence. Indeed, the case law has grown to reflect this belief, and the Supreme Court itself has proclaimed the rarity of predatory pricing.[1] To understand why public perceptions aboutpredatory pricing could diverge so dramatically from the view held by the courts and commentators, one must consider the history of predatory pricing doctrine.

I. THE TRUST ERA

That large business firms employed predatory pricing to destroy rivals was an unquestioned proposition during the "trust era" of the late nineteenth century. Indeed, one early commentator sympathetic to the new corporate structure observed that "cutthroat competition flourishes."[2] Here I examine the roots of this traditional dread of local price cutting. As with many public perceptions, current misgivings about price predation are inextricably rooted in the sentiments of the past.

The Pre-Trust Era

Prior to the passage of the Sherman Act in 1890, public regulation of predatory business activities was confined to the common law.[3] From Pierce *v.* Fuller [4] in 1811 onward, common law judges in the United States greatly depreciated the importance ohe premise that freedom to engage in trade would defeat the efforts of any merchant to dominate a market through predatory schemes.[5] Indeed, this notion was generated by the economists of the era.[6] Fraudulent practices were actionable, but it was extremely difficult for private litigants to recover damages under common law.

Not until the early 1900s did American economists become persuaded that predatory practices could be socially wasteful, in addition to being ethically objectionable. Initially, the reactions of leading economists to the passage of the Sherman Act ranged anywhere from arrogant amusement to hostility. The economist of the pre-trust era had been trained to believe that wide freedom of contract for businessmen would insure increased economic welfare. As long as entrepreneurs were barred legal protection against others who envied their profits, it was thought, competition would thrive.[7]

The Growth of the Trust

During the first half of the nineteenth century, markets were predominately local and nationwide concentration of output was low.[8] With the advent of extensive railroad service, telegraph, and subsequently telephone communications, national markets emerged for the first time in manufacturing after 1850. Competition thrived as firms encroached on each other's former home territory. After 1880, however, industrial concentration increased sharply. This was due in part to the rapid expansion of highly efficient firms, and even more so to an enormous number of mergers among previously independent concerns.[9] According to F.M. Scherer, the merger wave "was a reaction of epic proportions to the vast changes in transportation, communications, manufacturing technology, competition, and legal institutions coinciding during the close of the 19th

century . . . Its outstanding characteristic was the simultaneous consolidation of numerous producers into firms dominating the markets they supplied." [10]

The corporate form of business enterprise was taking shape. Although concentration on the local level may well have been prevalent in the early 1800s, concentration on the national level was a phenomenon. Between 1890 and 1910 a single firm came to produce 60% or more of total national output in approximately 65 industries.[11] Significant economies were being achieved in American manufacturing, and industry was undergoing a radical structural change. [12] By the final decades of the nineteenth century, the trust loomed as a major threat to the "traditional" economic structure. As more small businesses went under or joined the trust movement, more and more observers began to panic.

The advent of big business was alarming to academic and citizen alike. The plight of the small firm was publicized and dramatized. Trusts were ruthless, so the story went, and as they grew so did the public's resentment of them. On the eve of the passage of the Sherman Act, antipathy towards the trust was, as William Letwin puts it: simply a familiar feeling raised to a high pitch, intense because the speed with which new trusts were being hatched made it seem that they would overrun everything unless some remedy were found soon. The general disposition of the public was not in doubt.[13]

American businessmen who valued their independence had too much at stake to sit idle while the monstrous new corporations "stole" all their b usiness. In the midst of this clamor for a remedy to the problem, allegations of "unfair" competition and predatory practices became commonplace. Indeed, they were the logical offspring of the rapid change in industrial structure. As Donald Dewey aptly states: . . . any small businessman who has lost out in the competitive struggle to a larger rival is likely to believe that ipso facto he is a victim of unfair competition. If only to preserve his self-respect, he is loath to concede that he may have suffered defeat because the greater size of his rival conferred economies of scale that he could not match.[14]

The Economist

The reaction or American economists to the growing trust problem was mixed. At first the issue was either scoffed at or ignored, as noted above. But when it became evident that the large firm was here to stay, the economist was forced, much to his dismay, to do some painful rethinking. He was coerced into reevaluating his once unquestioned allegiance to the concept ofwelfare maximization through atomistic competition alone. He had to face the notion that the trust had prospered be use it was technically more efficient than the smaller firms.[15]

So what did this imply for economic theory? The economist could infer first of all that a single firm industry was of no great structural significance, since the mere existence of profits would be eroded by new entry, driving price back down to the competitive level. Or secondly, he could conclude that changes in technology had invariably subverted the preconditions of competition for the promotion of economic welfare. This would mean that technology had made the concentration of production in large firms not only inevitable, but desirable.[16]

Given his background, the American economist at the turn of the century had to either defend the trust or virtually ignore it. His plight was eased somewhat by the already popular doctrine of unfair competition. Writes Professor Dewey: From this painful dilemma he was liberated by the immensely convenient doctrine of unfair competition. For if the success of trusts rested mainly upon the use of unfair tactics and not upon economies of large scale, he could join laymen in calling for corrective legislation . . . and he was spared the embarrassment of arguing that the potential competition faced by a trust that totally controlled an industry was sufficient protection for the public interest.[17]

Indeed, several commentators defended the and at the same time denounced it on precisely this basis.[18] economists differed in the importance they placed on the role of predatory practices in the growth of monopoly, by 1920 few doubted that the practices existed or would exist in the absence of prohibitive legislation. [19]

Predatory Pricing

Perhaps the most ruthless tactic allegedly employed by the trust to garner market power was that of local price cutting. The device was widely considered to be the most cutthroat of predatory tactics. Competitors, it was believed, were unmercifully driven from the market by larger rivals, who were able to subsidize local price cuts with high prices in other markets.

Wrote John Bates Clark and John M. Clark in 1912: There are, as we have seen, certain ways, nearly all well known, in which a trust can crush an efficient competitor . . . It may resort . . . to the familiar plan of cutting prices locally—entering its rival's special territory and selling goods there below the cost of producing them, while sustaining itself by means of higher pr es charged in other portions of its field.[20]

The two commentators cited predatory pricing as a major source of monopoly in America.[21]

Notorious for predatory price cutting at the turn of the century were the Standard Oil trust, the American Tobacco trust, the National Cash Register Company, the DuPont Gunpowder trust, the Corn Products Refining monopoly, and others. The early 1900s saw a number of lawsuits brought both by the United States government and private plaintiffs in which alleegations of sales below cost and findings of predation were made.[22] Contemporary analysts such as William Stevens exhorted the antitrust authorities to action with commentary that exposed the ruinous business practices in industry after industry.[23] Indeed, modern day critics still rely heavily on his writings and those of his colleagues.

The model of the classic predator subscribed to in the trust era is perhaps best stated by Robinson: Where two firms are of approximately equal size and efficiency, and possessed of nearly equal resources, the cutting of price is an inevitable part of the competitive struggle and likely to leave surviving the stronger, and thus usually the more efficient, of the two. But where the two competing firms are of very unequal size and financial strength, the drastic cutting of prices will almost certainly lead to the extinction of the smaller and not necessarily the potentially less efficient of the two firms. For the smaller firm is unlikely to be competing with equal intensity throughout the whole area of the market, or throughout the whole range of products of the larger. A drastic cut of price by the larger firm in some small part of its territory will thus greatly injure the smaller competitor, while leaving the larger able to earn monopoly profits elsewhere.[24]

The classic theory went virtually unchallenged until the late 1950s, when economists began to question their own, and popular, notions about predatory pricing. The stream of literature since has altered dramatically the views of most scholars and has impacted substantially the law on predatory pricing.

II. EVOLUTION OF THE LITERATURE AND CASE LAW

Traditional fears about predation remained entrenched in the literature until Leeman challenged the classic model in 1956 [25] and published his famous analysis of the Standard Oil case [26] in 1958. [27] McGee attacked the classic theory, postulating that predation is an irrational course of action for a dominant firm and that mergers or collusion will always be more efficient means of monopolization by the dominant firm.[28] Moreover, his empirical study of the trial record in Standard Oil bore out his theoretical assertion. He found no evidence of attempted predation by Standard Oil.[29] McGee's findings were unexpected and startling to an academic environment that did not doubt the efficacy of predatory practices.

Nevertheless, commentaries that followed over the next fifteen years reinforced expanded the McGee hypothesis through both theoretical [30] and empirical analysis.[31] The oft- cited study of the Gunpowder Trust by Elzinga,[32] well as Koller's debunker of a large number of predatory pricing allegations,[33] lent strong credence to McGee's factual findings.

The apparent consensus in the literature that developed as a result—that predatory pricing should be a minor concern of the antitrust laws, if any concern at all—had no effect on the case law, however. As evidenced by the Supreme Court's infamous 1967 opinion in Utah Pie [34] courts continued on the course set in motion by the early Sherman Act cases, and judicial findings of predatory pricing we much more common than the McGee theory would have allowed.[35] Evidently, the courts were not yet ready to accept such a radical contravention of the conventional wisdom.

Then, in 1975, Professors Areeda and Turner offered a cost based rule of determining whether or not a pricing strategy is "predatory." [36] The Areeda-Turner article has influenced the case law perhaps more than any other single work in all of antitrust literature. To oversimplify a bit, Areeda and Turner hold that any price at or above short-run marginal cost (or, as a more easily ascertainable surrogate, average variable cost) is nonpredatory, while a price below short-run marginal (or average variable) cost is predatory.[37] Although rejecting the McGee argument that predatory pricing is "irrational," Areeda and Turner designed their rule around the notion, offered by McGee, that predatory pricing is comparatively rare and that any policy on predation should minimize deterrence to competitive pricing.[38]

Since publication of the Areeda-Turner article a decade ago, the courts have relied almost exclusive on economic analysis to evaluate predatory pricing allegations.[39] The case law in the main reflects the influence of the Areeda-Turner marginal cost standard.[40] As Hurwitz and Kovacic note, the Areeda-Turner rule "has provided either the analytical foundation or the poin of departure" for most post-1975 predatory pricing decisions.[41] The substantial reliance by courts on cost-based presumptive rules[42] to determine whether a price is "predatory" has made antitrust violations dependent upon a showing of predatory pricing extremely difficult for plaintiffs to prove.[43]

Finally, in two recent decisions that should serve to further deter predatory pricing litigation, the Supreme Court has pronounced its view that predatory pricing is rare. Relying heavily upon the recent literature most hostile to predation claims, the Court concluded in its 1986 Matsushita and Cargill decisions that "predatory pricing schemes are rarely tried, and even more rarely successful." [44] The language employed by the Court in the two cases is broad and seriously questions the plausibility of most allegations of price predation. Between the Areeda-Turner standard and the recent declarations of the Supreme Court in Matsushita and Cargill, predatory pricing claims now appear caught between a rock and a hard place.

III. MARKET REALITIES AND THE LEGACY OF THE TRUST ERA

The dramatic shift in economic and judicial thought on predatory pricing reflects a much more complete understanding of the economics of predation than was available in the trust era. Careful analysis demonstrates that, in fact, predatory pricing will very rarely be a profit-maximizing strategy even for a dominant firm. For predatory pricing to be a rational course of action, the predator must expect to recover, through later monopoly profits, more than the losses suffered during the price war.[45] But the costs of price predation are certain and substantial while the benefits, in the form of future monopoly profits, are speculative. Thus, firms will rarely endeavor to exclude rivals through below-cost pricing; if they are concerned with making money, they will resort to more profitable forms of business behavior.[46]

There are several reasons to conclude that predatory pricing will rarely be profit-maximizing even for a firm with a large market share, the following of which appear most compelling to me.

First, withstanding predation is profitable for the victim when there are monopoly profits to be made in the market, and the victim therefore has a strong incentive to stay.[47] Second, capital markets are sufficiently perfect to sustain a victim (or his assets) during profitable resistance of predation.[48]

Third, losses during a price war will be absolutely and proportionally higher for the predator than for the victim. The predator must expand output at ever-increasing costs to hold down the market price, while the victim may reduce output or even shutdown altogether for a period and thereby reduce costs.[49] Fourth, the illegality of mergers to effect monopoly will block purchase of the victim by the predator, so the price war

will have to last the useful life of the victim's assets to drive them from the industry, becoming all the more costly.[50]

Fifth, if the victim is driven from the market, investors can purchase the victim's assets at depressed prices caused by the price war, keeping them available for continued production.[51] Sixth, entry and exit impediments will be symmetrical. Thus, the predator will find it difficult to drive out a highly capitalized firm, while quick exit of firms with proportionally high variable costs will bring quick reentry (or new entry) when prices are once again raised to monopoly levels.[52] In any case, there must be an entry barrier significant enough that, once the victim is driven from the market, future monopoly pricing will not lure new entry or reentry before the costs of the predation can be recovered. [53]

Seventh, the further anticipated monopoly returns are pushed into the future, the less will be their present value, and the less likely will predation be found profitable in light of short- run losses and sacrificed profits.[54] Moreover, the risk associated with uncertainty about other future economic condition will reduce the present value of future monopoly returns.[55]

Thus, the Supreme Court in Cargill wrote: "[I]t is plain that the obstacles to the successful execution of a strategy of predation are manifold, and that the disincentives to engage in such a strategy are accordingly numerous."[56] The empirical studies cited above, finding that predatory pricing is much more rare than commonly believed, substantiate this reasoning.

Why, then, do Senator Breaux, the Commission, and so many others continue to hear predatory pricing complaints? The answer, I believe, lies in the incentives that many businessmen have to complain and the precedent that lingering fears from the trust era afford them.

First, less efficient businesses have every incentive to complain about price competition or lobby for laws curtailing price cutting. With their livelihood at stake, the costs of doing so will be greatly exceeded by the potential benefits; the danger of going out of business is worth a letter to one's Congressman or a lobbying effort by one's trade association.

At the same time, the language of "unfair competition" is still available for appropriation by disgruntled merchants. The conviction that predatory pricing is widespread and dangerous was so pervasive for such an extended period that it will likely persist, in society as a whole, for a long time to come. Indeed, if it took decades for the opinions of economists to evolve, then laymen, for whom acquisition of such knowledge may be prohibitively costly, cannot be expected already to have left behind the deep-seated fear of "bigness" generated in the trust era.

With this persisting air of legitimacy for predatory pricing complaints, I would not expect them to evaporate any time soon. As noted above, any businessman is loath to concede that he could be priced out of the market by the at- or above-cost pricing of rivals. I have little doubt that most complaining businessmen, given the widespread belief in the efficacy of predatory pricing in the past, truly are convinced that they have been mistreated.

Neither the fact of such complaints nor their persistence, however, justifies a conclusion that predatory pricing is anything but rare. Too much credible evidence and analysis is to the contrary. The durability of unsubstantiated predatory pricing allegations proves no more than that society is still experiencing "hangover" from the trust era.

IV. CONCLUSION

As I stated in my February 4 testimony, I have no objection to providing the Congress, should it decide it truly so desires, with reports on Commission enforcement efforts respecting predatory pricing. Moreover, Commission staff will continue to investigate complaints, for there may be rare situations in which successful predatory pricing has been employed to the detriment of consumers. In my opinion, however, both Congressional and Commission resources would be better utilized by focusing on business activities that are much more likely to harm consumers than predatory pricing. Indeed, since price cutting is almost always beneficial to consumers, we should be far more concerned about business practices that tend to raise prices and restrict output than those that lower prices and increase output. [57]

more concerned about business practices that tend to raise prices and restrict output than those that lower prices and increase output.[57]

I thank you and the Committee again for this opportunity to explain more fully my views on predatory pricing.

Sincerely,

TERRY CALVANI, *Commissioner.*

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[1] Matsushita Electric Indus. Co. v. Zenith Radio Corp., 106 S.Ct. 1348, 1357-58 (1986); Cargill, Inc. v. Monfort of Colorado, Inc., 107 S.Ct. 484, 494-95 (1986).

[2] Raymond, A Statement of the Trust Problem, 16 Harv. L. Rev. 79, 91 (1902).

[3] Cassady & Brown, Exclusionary Tactics in American Business Competition: An Historical Analysis, 8 U.C.L.A. L. Rev. 88, 91 (1961).

[4] 8 Mass. 222.

[5] D. Dewey, Monopoly in Economics and Law 179 (1959).

[6] D. Dewey, The Theory of Imperfect Competition 139-41 (1969).

[7] Id. at 139-40.

[8] F. Scherer, Industrial Market Structure and Economic Performance 67-68 (2d ed. 1980).

[9] Id.

[10] F. Scherer, Industrial Market Structure and Economic Performance 61-62 (1970).

[11] Dewey, supra note 6, at 123.

[12] Scherer, supra note 10, at 61.

[13] Letwin, Congress and the Sherman Antitrust Law: 1887-1890, 23 U. Chi. L. Rev. 221, 235 (1956).

[14] Dewey, supra note 6, at 122-23.

[15] Id. at 140.

[16] Id.

[17] Id. at 140-41.

[18] See Raymond, suora note 2; J. Clark & J. Clark, The Control of Trusts (1912), rewritten and enlarged, August M. Kelley Publishers, New York, 1971, at 97.

[19] Dewey, supra note 6, at 141.

[20] Clark and Clark, supra note 18, at 96-7.

[21] Id. at 97-99.

[22] See, e.g., United States v. American Tobacco Co., 221 U.S. 106 (1911); Puerto Rican American Tobacco Co. v. American Tobacco Co., 30 F.2d 234 (2d Cir. 1929). See generally D. Dewey, supra note 5, at 179-95; Cassady and Brown, supra note 3.

[23] See W. Stevens, Unfair Competition (1917); The Powder Trust, Q. J. Econ., May 1912; The Dissolution of the Power Trust, Q. J. Econ., November 1912.

[24] E. Robinson, Monopoly 74 (1941).

[25] Leeman, The Limitations of Local Price Cutting as a Barrier to Entry, 64 J. Pol. Econ. 329 (1956).

[26] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

[27] McGee, Predatory Price Cutting: The Standard Oil (N.J.) Case, 1 J. L. & Econ. 137 (1958).

[28] Id. at 139-40.

[29] See id. at 141.

[30] See Dewey, Competitive Policy and National Goals: The Doubtful Relevance of Antitrust, in Perspectives On Antitrust Policy 81 (A. Phillips ed. 1965); McGee, Some Economic Issues in Robinson-Patman Land, 30 L. & Contemp. Probs. 530 (1965); Stigler, Imperfections in the Capital Market, 75 J. Pol. Econ. 287 (1967); Telser, Abusive Trade Practices: An Economic Analysis, 39 L. & Contemp. Probs. 488 (1965) ; Telser, Cutthroat Competition and the Long Purse, 9 J. L. & Econ. 259 (1966) (costs to predator of sustaining a price cut to average variable cost increase relative to those of an equally efficient competitor with each successive period of a price war). See also D. Dewey, supra note 6, at 122-41 (introducing "uncertainty" into predatory pricing analysis).

[31] See B. Fog, Industrial Pricing Policies 146-52 (1960) (indicating, based on interviews with Danish firms, that predatory pricing is not common); Elzinga, Predatory Pricing: The Case of the Gunpowder Trust, 13 J. L. & Econ. 223 (1970) (concluding that predatory pricing by the Powder Trust, if it existed at all, was not nearly as prevalent as believed); Kamerschen, Predatory Pricing, Vertical Integration, and Market Foreclosure, 2 Indus. Organizational Rev. 143 (1974) (studying the Memphis Ready-Mix Concrete case and concluding that no convincing evidence of predation was presented); Koller, The Myth of Predatory Pricing: An Empirical Study, 4 Antitrust L. & Econ. Rev. 105 (Summer 1971) (examining data on twenty-six convictions for predatory pricing and finding only three instances of sales below cost with predatory intent that caused a misallocation of resources); Zerbe, The American Sugar Refinery Company, 12 J. L. & Econ. 339 (1969) (concluding that predatory price cutting by the Sugar Trust was rarely, if ever, practiced and in no case was successful).

[32] See Elzinga, supra note 31.

[33] See Koller, supra note 31.

[34] Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

[35] See Calvani & Lynch, Predatory Pricing Under the Robinson-Patman and Sherman Acts: An Introduction, 51 Antitrust L. J. 375, 378 (1983).

[36] Areeda & Turner, Predatory Pricing and Related Practices under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697 (1975).

[37] For a brief but more complete discussion of the Areeda-Turner rule, see Calvani and Lynch, supra note 35, at 380-81.

[38] 3 P. Areeda & D. Turner, Antitrust Law para. 711(b) (1978).

[39] See, e.g., Hurwitz and Kovacic, Judicial Analysis of Predation: The Emerging Trends, 35 Vand. L. Rev. 63, 94 (1982).

[40] See, e.g., discussion of case law in Hurwitz & Kovacic, supra note 39, at 78, 97, 99-112, 149-50; Calvani & Lynch, supra note 35, at 394-96.

[41] Hurwitz & Kovacic, supra note 39, at 78.

[42] See id. at 99-110, 149-50.

[43] See id. at 139-49 & n.295.

[44] Matsushita Electric Industrial Co. v. Zenith Radio Corp., 106 S.Ct. 1348, 1357-58 (1986); Cargill, Inc. v. Monfort of Colorado, Inc., 107 S.Ct. 484, 495 n.17 (1986). In Matsushita, the Court overturned a denial of summary judgment to a group of Japanese television manufacturers accused of attempting to drive American manufacturers out of business through predatory pricing.

[45] See Matsushita, 106 S.Ct. at 1357.

[46] The Supreme Court wrote in Matsushita that "[a] predatory pricing conspiracy is by nature speculative . . . the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition," a costly and uncertain outcome. 106 S.Ct. at 1357; see Cargill, 107 S.Ct. at 495 n.17.

[47] See McGee, Predatory Pricing Revisited, 23 J. L. & Econ. 289, 296-97 (1980).

[48] See R. Bork, The Antitrust Paradox: A Policy at War with Itself 147-48 (1978); Easterbrook, Predatory Strategies and Counterstrategies, 48 U. Chi. L. Rev. 263, 270 (1981); McGee, supra note 47, at 297.

[49] See R. Bork, supra note 48, at 149-52; Easterbrook, supra note 48, at 272-75; McGee, supra note 47, at 296-97. The Supreme Court noted in Cargill: "In order to succeed in a sustained campaign of predatory pricing, a predator must be able to absorb the market shares of its rivals once prices have been cut. If it cannot do so, its attempt at predation will presumably fail, because there will remain in the market sufficient demand for the competitors' goods at a higher price, and the competitors will not be driven out of business." 107 S.Ct. at 494 n.15.

[50] See R. Bork, supra note 48, at 153; McGee, suora note 47, at 297-98.

[51] See R. Bork, supra note 48, at 153; Easterbrook, supra note 48, at 271-72; see Cargill, 107 S.Ct. at 494-95 n.15.

[52] See R. Bork, supra note 48, at 153; McGee, supra note 47, at 297.

[53] See Matsushita, 106 S.Ct. at 1357-58, 1359 n.15; Cargill, 107 S.Ct. at 494 n.15.

[54] See R. Bork, supra note 48, at 153-54; Easterbrook, supra note 48, at 272; McGee, supra note 47, at 296-97.

[55] Easterbrook, supra note 48, at 272.

[56] 107 S.Ct. at 495 n.17.

[57] The Supreme Court wrote in Matsushita that "cutting price in order to increase business often is the very essence of competition." 106 S.Ct. at 1360. Thus, mistaken inferences in cases attacking price cutting are especially costly, "because they chill the very conduct the antitrust laws were designed to protect." Id."

Senator GORE. Thank you very much. We are going to try to do just that. I inadvertently departed from the rule of seniority because we have prepared statements from you and Commissioner Strenio, but let me redress that mistake and call on Commissioner Bailey for any comments she might have. I count her as a friend and have tremendous respect for your work on the Commission, so please proceed.

Ms. BAILEY. Thank you, Mr. Chairman. I appreciate that. I just want to say to you and to members of the Committee that I appreciate the fact that these hearings have been scheduled, and thank you for the opportunity to testify. I do not have prepared testimony, as you know. I decided that there was little that I could add to the testimony I have submitted many times over the past five years while our authorization has been pending, but I would like to make a few comments.

I support the Chairman's testimony. As he has fairly noted, we do not all agree on every provsion of either the House or the Senate bill, but we do all agree, I believe, that notwithstanding those differences, the time has surely come for the Commission to be reauthorized, and because the points of controversy in these bills as Senator Kasten noted, have been severely reduced over the years, I believe, and I think we all believe, that whatever quarrels we may have about this or that provision we are prepared to see them resolved as they are in these bills and to put them behind us and move ahead.

I should probably say a few things for the record because I do have a long record of positions on the issues involved in our reauthorization, and my acquiescence in some of the provisions in S. 1078 should not be misunderstood. I oppose all special interest exemptions to the FTC Act. The provision in S. 1078 removing the Commission's authority to promulgate industrywide rules in the advertising area is just such an exemption. I understand it is an overreaction to the Commission's ill-fated proceeding a decade ago concerning television advertising for children. Frankly, I would prefer a straightforward provision in the bill barring the FTC from concerning itself with that subject if that is what the Congress intends.

The provision as it is written, to camouflage, I think, that subject for some reason sweeps too broadly in my opinion. I say that because one of our most uncontroversial and clearly beneficial recent rules, that governing the labeling and advertising of home insulation, the R value rule, is based in significant degree on our unfairness authority. I believe there is no argument that the R value rule is serving the public well.

In addition, the original FTC rule mandating disclosures regarding the link between cigarette smoking and various diseases, the mileage ratings of automobiles, now handled by the EPA, and the required disclosures of octane levels in gasoline, which alone save consumers millions of dollars a year are all based in significant part on our unfairness authority. So it seems to me unwise to foreclose that avenue of consumer protection should it be needed or useful in the future. Still I and others have pointed this out to no avail over the years and I am prepared in the interest of reauthorization to acquiesce in this foreclosure, although I think it is unwise and unnecessary. I could mention other points, but I see my yellow light is on, so just let me say that my main interest, Mr. Chairman and members of the Committee, is to move ahead.

Though our numbers have dwindled at the Commission and our budget has shrunk over 30 percent in the last five years, we are fortunate still to have a dedicated and talented staff in Washington and in our regional offices who are fully capable and eager to wisely and vigorously enforce the nation's consumer protection and antitrust laws. They have accumulated expertise and training which should not be further dissipated because of uncertainty over the agency's future or indecision about its purpose.

The Federal Trade Commission has demonstrated over 75 years its ability to act well in the public interest. I would like to see us embark on a positive agenda for the future. We are fully capable of doing that, and with your help, that is, with the vigorous interest and oversight of this Committee, we can do it. Thank you.

Senator GORE. Thank you very much.

Commissioner Azcuenaga, do you have any words to share with us briefly?

Mr. AZCUENAGA. Thank you, Mr. Chairman.

First of all, I would just like to say that I am delighted to be here this morning, and I want to thank you for inviting us. I share the view of the rest of my colleagues, and indeed probably almost everyone in the room, and the Committee as well, that authorization is extremely important for the agency, and I am very optimistic that that goal can be accomplished. I have been very involved with and concerned about all the issues that are raised by the authorization bills that have been presented, but I would like to address only one aspect of the Commission's statement and to qualify my endorsement of that statement in only one respect.

I generally oppose limitations on the Commission's substantive authority, including the proposed limitation on the Commission's ability to issue rules based on unfairness in advertising. I recognize, however, that the Commission is unlikely to have frequent occasions to exercise that authority and that if the proposed limitation is imposed, the Commission would retain its ability to deal with unfair advertising on a case by case basis. With that in mind, if the Congress should decide that this particular limitation should be imposed, I believe that it would not seriously impair the Commission's ability to carry out its mission to protect the American consumer. I would be happy to answer any questions that the Committee may have.

Senator GORE. Thank you very much.

Commissioner Strenio?

Mr. STRENIO. Thank you, Mr. Chairman. As the newest Commissioner, I am pleased to be here today to discuss the Federal Trade Commission's reauthorization for the first and, I hope, the last time. At times like this, coming after my four distinguished colleagues have already tesified, I take some comfort from the biblical injunction that the last shall be first. Mr. Chairman, in the interest of brevity, I would like to make just a few points this morning and submit my prepared statement for the record.

The Commission statement submitted to you covers issues that will need to be resolved during Congressional deliberations. In general I am in accord with the positions espoused in that statement. In particular, I fully support new authorization legislation. Rather than repeat discussion contained in the Commission statement I would now like to explain briefly my views on three of the issues where I have a distinct perspective to offer.

The first issue concerns the Commission's competition and consumer advocacy program, which is also known as the intervention program. This program consists of sharing with other governmental agencies FTC expertise on competitive issues and on issues that vitally affect consumers. In fact, approximately 20 percent of our inteventions are submitted in response to Congressional requests. The intervention program thus provides substantial public benefit. Moreover, in my experience with the intervention program both as its director from 1982 through 1984 and as a Commissioner, the FTC frequently has been the sole representative of consumers' interests.

In this context, I have some concerns about Section 9 of H.R. 2385. Section 9, as you know, would require the Commission to provide Congress with notice either 60 days in advance or as soon as practicable prior to intervening in the proceedings of any agency.

Unfortunately, if experience is any guide, 60-day advance notice is unlikely to be practicable for a great many interventions. First, the Commission does not authorize any interventions prior to reviewing the final draft staff comments. It is extremely rare for an intervention to be authorized more than a day or two before the filing deadline and many are approved only hours before the deadline. Second, it is also common for there to be fewer than 60 days between an initial request for FTC comments and the deadline for receipt.

Section 9 does try to take these difficulties into account by its "where practicable" language. However, there are preferable alternatives such as having the FTC staff provide a final version to the relevant committees as soon as filing is authorized by the Commission. Indeed, it is my understanding that the Commission currently provides Congress with copies of all interventions on a weekly basis.

The second issue involves the most recent reauthorization proposals in S. 1078 and H.R. 2385 that would prohibit the Commission from using its unfairness authority as a basis for initiating rulemaking proceedings involving commercial advertising. Under these proposals the FTC would retain authority over individual commercial advertising cases brought under unfairness theories. In my view, the most important consideration here is that the Commission should be allowed to keep its authority to bring individual cases. Whether the Commission should have rulemaking authority is a closer question.

Third and finally, the 1985 reauthorization package approved by the Senate would repeal the Commission's public participation funding authority. If the Commission had a surplus of funds available, I would question more seriously repealing our authority here. But in light of the severe budget limitations facing the agency, I think all funds available to the FTC are vitally needed to assure an adequate enforcement and regional office presence. For this reason, I do not object to repeal of the Commission's public participation funding authority.

Mr. Chairman, putting the Commission on a fast track toward reauthorization would be a welcome indication of Congressional intent and would assist the Commission in achieving our joint goals. Such action would have the additional benefit of boosting staff morale. I look

forward to working with you and the entire Committee in forwarding this legislation.

Senator GORE. Thank you very much. Let me say to my colleagues we are going to strictly enforce the five-minute rule. We are in trouble on time today because we are going to have to give up the room before noon, and we have another witness and then a panel of witnesses, so we must move right along. I will start off the questioning in my five minutes by asking you, Chairman Oliver, whether or not the position you have enunciated on any of the authorization issues differs from that of the Commission under Chairman Miller.

Mr. OLIVER. Senator, I do not believe that they differ, but I would have to go back and check former Chairman Miller's statements.

Senator GORE. We will give you a chance to revise that answer if you want to, but I did not hear any differences.

Mr. OLIVER. I am not aware of any offhand.

Senator GORE. Now, on the subject of insurance, if Congress gave you the authority to investigate insurance issues on their own, what areas would you envision the FTC examining?

Mr. OLIVER. I cannot answer that question in detail, but it does seem to me that we would ask the Bureau of Economics to see if there were any areas where there was anticompetitive conduct. I know that there is a certain amount of ratesetting that goes on in the insurance industry which may be entirely proper, but it seems to me that would be a fertile ground for our looking at it to see if there were anticompetitive activities going on. There may be lots of other areas, too. I am reluctant to have an entire industry exempt from scrutiny and think that we should be able to see if there are any anticompetiive activities, but ratesetting would strike me as a fertile field.

Senator GORE. Commissioner Bailey.

Mrs. BAILEY. Thank you. May I just add that at the time as an indication of what we might get into, at the time that our authority to study problems in the insurance industry was terminated a few years ago, we were in the midst of doing an evaluation, a study of the problems associated with Medigap insurance, which I think was a problem then. I believe we were allowed to finish that, but another thing that had come to our attention that we were concerned about was the marketing of some kind of cancer insurance. Those are the sorts of things we had been involved in in the past.

Senator GORE. Some have mentioned title insurance also. Personally, I would, if I were Chairman, I look more to the regional offices than to the Bureau of Economics because I think they have been getting a lot of complaints lately. Moving to another question, does the FTC have a role in studying or advising Congress and the Secretary of Agriculture, on the effects of agricultural market orders?

Mr. OLIVER. Again, Senator, my feeling would be that we have. We have experts whose business is to examine industries and find out where there is insufficient competition, where there are practices that harm the American consumer. I would suppose that the FTC would have a lot to say about whether certain practices could be anticompetitive and inimical to the American consumer.

Senator GORE. Do I understand your position to be that all restraints on FTC authority in regard to agricultural cooperatives be removed?

Mr. OLIVER. I think we should certainly be able to study the effects of—the activities of agricultural cooperatives. Yes, Mr. Chairman.

Senator GORE. Do you see anything uniquely distinguishing about advertising that would justify an exemption for advertising from the FTC's unfairness rulemaking authority as contrasted with direct sales practices?

Mr. OLIVER. The advertising business by its nature would tend to take up a lot of time in connection with rulemaking, which is why I suspect that conceding the authority to make rules in connection with unfairness would in a sense not give up an awful lot. I think rulemaking for advertising would be very cumbersome.

Senator GORE. So you would justify an exemption for advertising on grounds that it would take up too much of your time?

Mr. OLIVER. I think rulemaking had proved to be very cumbersome and would prove to be very cumbersome in advertising.

Senator GORE. It is too difficult for you to do?

Mr. OLIVER. And it is not likely that we would spend the time, and in fact case by case handling of a matter would be a more efficient way to handle any particular problem that the FTC had identified in the advertising world.

Senator GORE. I can already begin to feel how difficult it is to keep these compromises together, but we will. I am comforted by the knowledge that we will have an opportunity to come back during oversight hearings and review a lot of these issues, and I do think that we should move forward with authorization of the agency, of the Commission. I certainly do agree to that.

The Small Business Legislative Council claims it has reason to be optimistic because of meetings with you, Chairman Oliver, and others that the FTC will continue to investigate predatory pricing on an industry by industry basis. Is there any justification for their optimism?

Mr. OLIVER. Senator, we will review complaints about predatory pricing in the future as the Commission has done in the past and we will also continue to meet with the members of that council. I cannot state whether the vital activities of the Commission will be any different from the activities that have been in the past.

Senator GORE. My time is up. Senator McCain?

Senator MCCAIN. Thank you, Mr. Chairman, and I thank the panel and members of the Commission for being here.

Chairman Oliver, you mention in your statement that you are in support of the Commission funding of $69.85 million for fiscal year 1988, which I believe is only slightly above the 1987 level. Is that correct?

Mr. OLIVER. I think that is correct.

Mr. MCCAIN. It is about four million more than last year.

Mr. OLIVER. It appears to be more.

Senator MCCAIN. Commissioner Bailey mentioned that the budget has shrunk over 30 percent in the last five years for the Commission. Is that accurate?

Mr. OLIVER. It is my understanding that the budget has shrunk. I do not know the percentages.

Senator MCCAIN. My question is, if the budget has experienced a decrease of around 30 percent and we are at roughly the same level as last year, how would you propose to be able to address the issues of oversight of agricultural cooperatives and insurance with such limited funding? I think a case could be made that without proper staffing and increased funding, you would be stretching yourself more thinly than you are now.

Mr. OLIVER. Senator, the total number of employees at the Commission has declined by several hundred, I believe, since 1980 or 1981. My understanding is, and I would have to review the figures, that the level of activity, however, in terms of cases brought or in terms of cases won has essentially not decreased. I believe it would be fair say that the level of activity of the Commission has stayed roughly the same, notwithstanding a decrease in the number of full-time personnel, so I would not think that the ability of the Commission was significantly decreased by those budget reductions. Of course, the Commission always has to make choices as to the matters that it will investigate, matters that it will prosecute.

It would seem to me to make sense to investigate those areas where it is rather most likely that there could be anticompetitive activities that would harm the American consumer. So it might well be that even with a constant funding level the Commission would decide to study this area, market orders in the case of your question, instead of some other area that they have been studying because they might believe that it was more likely they would find anticompetitive activities. I would not suppose that the budgetary constraints that everybody faces would necessarily be a reason for continuing exemption of a whole area of commerce from our consumer protection scrutiny.

Senator MCCAIN. Well, I hope that you and the Commission can convince the Congress that you have the capability for expanded authority, because that is a very important aspect of your quest for increased areas of responsibility. It seems to me unless you are very badly overstaffed and overbudgeted five years ago you have got your hands full in carrying out the obligations and responsibilities that you now have.

Chairman Oliver, are you aware of any instances in which the FTC has failed to bring a suit after it has received notice of a violation of unfair or deceptive acts or practices authority from a state's attorney general?

Mr. OLIVER. Senator, I am not quite sure how to answer the question, because I am not sure I understand it.

Senator MCCAIN. Have you failed to act if any state attorney general has brought to you a case of an unfair or deceptive act of practice?

Mr. OLIVER. That in that attorney general's opinion was an unfair act or deceptive practice? I am not aware of any such case, Senator.

Senator MCCAIN. Thank you. Finally, a matter of concern in my state and throughout the southwest is the increasing volume of arts, crafts, and jewelry which is falsely passed off as having been produced by na-

tive Americans, and it is exacerbated by the terrible economic conditions that exist on our Indian reservations. They are unable to manufacture these products at equal or lower price than mass manufacturing that comes from abroad, and I hope you are taking some steps to ensure that this counterfeiting problem is addressed.

Mr. OLIVER. My understanding is that the Commission did put out a brochure several years ago, the point of which was to advise consumers on how to tell fake products from the genuine ones.

Senator MCCAIN. I hope that you will have another look at this issue, because I think it is a serious problem among some of our most deprived citizens.

Thank you.

Senator GORE. Well, let me say as chairman, this subcommittee will be interested in that particular issue, and putting out a brochure just to inform people is not the same thing as enforcement activity. I want to share my colleague's concern on that.

Senator Kasten, in order of appearance.

Senator KASTEN. Mr. Chairman, thank you.

Let me just understand your position on the funding level. At this point you are asking for $4 million more than last year, is that the funding level? Are you united in a position on funding?

Mr. OLIVER. Yes, I believe we are. And I believe that the extra $4 million includes some dollars that we did not pay in previous years. So while it is a $4 million increase, in fact it reflects taking on some separate obligations.

Senator KASTEN. But this increase—in the past years, we have seen level budgets or decrease. This increase you believe is, number one, necessary, and number two, adequate to meet your responsibilities for next year?

Mr. OLIVER. Yes, Senator, both of those.

Senator KASTEN. So the President's request is a request that is supported by the Commission?

Mr. OLIVER. Yes.

Senator KASTEN. And the President is asking for an increase for the FTC?

Mr. OLIVER. That is correct.

Ms. BAILEY. Excuse me. I will correct this later if I am wrong, but my understanding is that the increased money is in large part for the pay increase that was voted by the Congress, for funding of the retirement system which has been changed by the Congress, and an increase in the rent.

Senator KASTEN. Some people have to absorb all of those. I just wanted to understand, we are all in agreement on the budget and that OMB was supporting that increase?

Mr. OLIVER. Yes, that is correct. This figure covers funds for the pension system, which was previously funded out of general treasury funds. So some of the $4 million increase reflects those payments.

Senator KASTEN. I was going to ask you to further define your position on advertising, but I think you have done so adequately and I do not want to waste the time of the committee for you to restate your answer to the chairman's question.

I just want to say to all of you, thank you and congratulations for coming before us with a statement reflecting the view of the full Commission. I also appreciate everybody's candid comments. The only way we are going to get through this authorization this year is if we all are up-front and candid.

And the fact that we are finally able to compromise and say no for rulemaking, but yes for case-by-case regulation in one small category, has made it possible for us, at least on our side, to get to an overwhelming vote on the Senate floor and a unanimous vote here in the Committe.

So I just appreciate your statement reflecting the views of the full Commission, but even more importantly your open and candid statements. And I think that with Chairman Gore's leadership we are going to be able to work our way through these few little roadblocks that are remaining. And we have got time this year.

I just look forward to working with all of you. I hope that the witnesses who are going to be appearing later today and tomorrow are also going to be as open and forthcoming, and just as cooperative, because that is the only way that we are going to be able to enact authorization legislation.

Thank you, Mr. Chairman.

Senator GORE. Senator Breaux.

Senator BREAUX. Thank you very much, Mr. Chairman.

I thank the members for being here this morning. I guess I may be the senior member of the Congress if you consider House service, but I am certainly the newest member of the Senate and new to this particular committee. I have a great deal to learn and look forward to working with my colleagues and learning more about the work that the Commission is charged with handling.

I noted with some interest, Mr. Calvani, in your prepared statement, in which you talk about having no objection to providing the Congress with reports on Commission enforcement efforts respecting resale price maintenance and predatory pricing, and that you view the proposed requirements for their submission to be a waste of the Commission resources and hence the taxpayers' money.

You go on to say that "equally rare is predatory pricing, and both empirical and theoretical literature as well as the case law show that below cost pricing to exclude rivals is rare at best."

You view the reporting provisions as akin to requiring the expenditure of tax dollars for drafting a report to the Congress on unicorn sightings. It sounds like we are talking about the Endangered Species Act or something.

Last year in the House hearing, my colleague from Louisiana, Mr. Tauzin, the other half of the Cajun caucus in Congress, mentioned to Mr. Miller his real concerns about what he perceived to be predatory pricing in the grocery manufacturing business.

After he listed a number of predatory pricing practices that had been brought to his attention in Lousiana, the response from the Commission at that time was to acknowledge that these issues had been brought to their attention from many sources. Further, the Commission stated that it was actively looking into it, had held field hearings in five cities, and had gathered a great deal of testimony.

Tauzin pointed out that the Commission had not answered his letter, after having said they would get right on it.

I am wondering, about this. I get a variety of different complaints from small grocery people, from small department stores, from small hardware stores, all about perceived predatory pricing from some of the big folks, such as the K-marts, Walmarts, Martmarts, and all these big companies that come into a small town.

And a lot of the small people think they are being put out of business because of predatory pricing; and futhermore that when they are out of business, there is no control or competition for the big ones to keep the prices down.

I find your statement that it is like reporting on unicorn sightings a little disturbing, and it does not seem to be in keeping with the information that the Commission has been getting from members of Congress. I would like to ask anybody on the Commission: Do you share the opinion that predatory pricing is like reporting on unicorn sightings?

Mr. Calvani?

Mr. CALVANI. Mr. Breaux, I am delighted you asked that question. I am trying to figure out how to answer it in five minutes.

Maybe it is not a unicorn but, at least, it is a white tiger. There just is not the amount of predatory pricing that some people believe.

You know, when I grew up (I guess like all of us in junior high school), we all read Ida Tarbel's story of the Standard Oil trust. You went to bed every night looking under your bed for predators.

The fact of the matter is that we ought to be happy when consumers buy at cheaper prices. What really worries me is when consumers buy at high prices. I do not find it surprising in the least that we get lots of complaints. I get a lot of complaints. I am sure the members of the committee get a lot of complaints about predatory pricing. I want to suggest to you that most of them, perhaps not all of them, but most of them are made by disgruntled merchants who find themselves unable to compete for one reason or another. As a result of their inability to compete, they watch their customers leave their store where they are selling at higher prices and move to stores which sell at lower prices.

Mr. Breaux, you made reference to what is the underlying predicate of predatory pricing or price predation: that is that we are likely to see some big company move in and to lower its price—and that is good; consumers buy at a cheap price. But something bad is going to happen after thatThe big store is going to put the mom and pop store out of business, and then raise the price. They are going to gouge the consumer and make up the money that they lost earlier in the way of higher prices.

But that makes some unreal assumptions: first, that businesses are ready, willing, and able to——

Senator BREAUX. Let me interrupt, because the light is already changing colors over here. My question is, what is the attitude of the Commission? Is it just that we are not going to fool with this, that you made a philosophical or maybe a pragmatic decision that it does not exist, and all the complaints will be swept under the table?

Are we going to look at the complaints? Are we doing that? Have the reports been submitted back to Mr. Tauzin or not?

Mr. OLIVER. The Commission files reports. The next one is due on April 1, and the following will be due on November 1, 1987. We receive complaints. We log them in. They are all investigated. And they are for the most part closed, largely for the reasons that Commission Calvani stated. They are simply not found to have the harm that the people who are making the complaints think they have.

Senator BREAUX. We will have a chance to get into that more. Thank you for your comments.

One quick yes or no. You made a recommendation, Mr. Oliver, that the possibility of studying the insurance industry is something that you would like to have the authority to do. What is your position on the McCarren Ferguson Act as far as its status?

Mr. OLIVER. Senator, I have not come to a final position on the McCarren Ferguson Act. I am skeptical about its need. I think that the primary thing we should have is the ability to study the industry first.

Senator BREAUX. Thank you, Mr. Chairman.

Mr. CALVANI. Mr. Chairman, may I make a brief observation? The distinguished Senator from Louisiana, Mr. Breaux, has asked what I think is a very important question with reference to predatory pricing. I recognize that time is of the essence and there is little opportunity to give a full answer.

Accordingly,I would like the chair's permission to submit a fuller response to Mr. Breaux's question, so that the record on this will be complete.

Senator GORE. I was going to note that the record will be held open, because I could sense that desire on your part. And we will certainly do that.

Ms. AZCUENAGA. Mr. Chairman, could I respond to that question very, very briefly, that Senator Breaux has raised. I told Mr. Calvani, Commissioner Calvani, in the car on the way up to the hearing today that I disagreed with his statement about unicorn sightings and suggested that perhaps an animal not nonexistent as unicorns are, but a rare animal would be more appropriate, a white tiger or some other rare animal.

I do agree with Commissioner Calvani that we have found that instances of predatory pricing and resale price maintenance are much more rare than we formerly thought. But I do not share the view that I know some in the antitrust community have today, that they are nonexistent.

Senator GORE. Thank you very much.

We will have one more short round and then move on. I want to ask just a couple of brief questions.

I said in my opening statement and in my first round of questions that we are going to work together, Chairman Oliver, to get this reauthorization bill passed. But we have some profound disagreements about the role of the Federal Trade Commission and what it should be doing, and we are going to have a series of oversight hearings after we complete the reauthorization bill in the committee.

I read, along with others, your October 1986 speech chastizing the Better Business Bureau against the temptation to go too far. And I must confess, I was just flabbergasted that a chairman of the Federal Trade Commission would go before the meek Better Business Bureau and say, you are going too far, you better not be too aggressive in responding to consumer complaints.

What an anomaly for the chairman of the FTC to do that. I am wondering if the other Commissioners would like to briefly tell me whether or not they agree with Chairman Oliver's concern that the Better Business Bureau is in danger of being too aggressive?

Mr. OLIVER. Senator, may I respond first?

Senator GORE. Sure.

Mr. OLIVER. I gave that speech and I have to tell you, it was very warmly received. I received a number of speaking invitations from other Better Business Bureaus immediately following it. My judgment was that the speech was a complimentary speech to the Better Business Bureau.

Senator GORE. Well, they were delighted and amazed, I am sure.

Mr. OLIVER. I was as flabbergasted as you were to have the description that I was chastizing them applied to the speech.

Senator GORE. Were you not advising them that they were in danger of going too far?

Mr. OLIVER. I was pointing out, as I have pointed out dozens, if not hundreds, of times, that there is a danger of overregulation, as there is a danger of underregulation. People can regulate too much as well as too little. And I was simply pointing that out to them.

It was a small part of the speech, as I recall. But I have not read it since October, and it was certainly in no way an attempt to chastize them for doing what they have done for many years.

Senator GORE. Well, if there is a continuum of consumer protection zeal, those who are on the left part of that continuum would be wanting a consumer protection agency and wanting a lot of new activities. Those in the middle are saying, let us have an FTC at least that is active. Those on the far right extreme fringe would express the view that the Better Business Bureau may be in danger of going too far.

And to have someone who shares that view as chairman of the FTC, as personable and as nice a person as you are, I find it amazing.

And let me give the other Commissioners a chance to respond on the question of whether they think the Better Business Bureau is in danger of going too far. Commissioner Bailey.

Mrs. BAILEY. Well, Mr. Chairman, without characterizing my view of the Better Business Bureau and its activities as in any way in disagreement with the chairman's views—it may be or it may not be—I simply would say that my experience has been that the Better Business Bureaus have conducted some extremely important programs for consumers. The operation of the national advertising division, the whole self-regulatory apparatus for advertising is an excellent program conducted by the BBB.

And also, the arbitration programs they have conducted for automobile problems and in connection with one of our consent decrees and with us have been extremely productive for consumers. So my experience has been that they are good to work with, they have done some very good work.

Senator GORE. Fine. Other Commissioners, if they are not eager to speak up, can either submit responses for the record or not, as they like.

Finally, Chairman Oliver, can you give us a brief overview of what your agenda is as chairman of the FTC? What are your priorities?

Mr. OLIVER. My priorities are to try to make sure that competition remains in the American economy and to be vigorous in trying to root out anticompetitive activities, whether they are engaged in by private people alone or by private people with the help of government.

And we will be looking particularly, I hope, at the health care area, as I have said in a number of speeches, because it tends to follow what I call the Willy Sutton rule: That is where the money is. We spend about 10 percent of our income on health matters. It is important to all people.

It is particularly important to older people, and because it is a changing industry I think that we should be extra vigilant to make sure that as it changes it remains competitive, that the new forms and methods of providing health care to the public do not fall into anticompetitive modes, but remain competitive.

So that is a particular area where we will be focusing our attention.

Senator GORE. With the indulgence of my colleagues, let me just observe that we have had several chairmen at the FTC that have cited the health care industry as an area deserving of attention.

But in response to a question about your agenda and your priorities, I am not comforted to have the mention of a single industry in response to that question. If you would, I would like to request a fuller answer for the record, so that this subcommittee would have some idea of what your agenda is.

I would like to know what your agenda is, what your priorities are, not a generalized statement of concern about the health care industry in America. So please, if you would respond for the record to that.

Mr. OLIVER. I would be delighted.

Senator GORE. Thank you very much.

I am so frustrated at the lack of time on this occasion to explore so many other important questions. But as I said at the beginning, this particular effort is aimed at a single goal, and that is getting speedy reauthorization of the Federal Trade Commission.

We are of one mind on that, and we will work together on that. We have bipartisan agreement that this should be done, and we are going to do our very best to get you all authorized.

Thank you very much for being here. We will pursue these other questions during oversight hearings very soon.

To lay the foundation for later oversight hearings, I would like you to submit information concerning enforcement activity in the consumer protection and maintaining competition missions.

[The following information was subsequently received for the record:]

CONSUMER PROTECTION ACTIVITIES

[Approximate fiscal year]

	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	10/86–1/87
Initial phase investigation	187	215	218	208	255	200	277	256	278	202	53
Full phase investigation	64	82	82	88	67	68	86	75	68	100	10

CONSUMER PROTECTION ACCOMPLISHMENTS

[Approximate fiscal year]

	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	10/86–1/87
Final consent [1]	44	26	40	28	18	14	16	19	21	25	[2] 10
Complaints [3]	7	14	5	12	18	9	23	21	16	25	4
Civil penalties	14	12	13	24	26	12	17	9	11	11	2
Redress [4]	11	6	6	10	4	4	2	7	6	6	4
Rulemaking	6	18	12	13	11	14	26	30	35	36	10
Order modificaitons	2	2	6	8	9	7	14	8	2	5	2
Contempt actions:											
Pending	0	0	0	0	0	0	0	0	0	1	[5] 0
Completed	0	0	0	0	0	0	0	0	0	2	1
Total	84	78	82	95	86	60	98	94	91	111	33

[1] Includes part II and part III consents.
[2] Includes consents accepted subject to final approval (1987 only).
[3] Includes part III complaints, civil actions filed, and permanent injunctions.
[4] Does not include consumer redress obtained in matters already counted on the chart as final consents or civil penalties.
[5] Includes actions filed during fiscal year and not final at the end of the year.

MAINTAINING COMPETITION—MISSION ACCOMPLISHMENTS

[Fiscal year]

	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
Complaints	9	6	11	13	7	2	1	13	10	3
Part II consents	15	6	26	21	16	5	9	9	10	11
Part III consents	4	3	8	3	4	1	4	8	1	11
Preliminary injunctions filed	5	2	4	0	2	3	0	3	0	3
Authorized, not filed	NA	NA	0	1	0	0	0	1	3	2
Premerger action					[1] 1					
Civil penalty actions filed	2	2	3	1	3	1	0	3	2	2
Subtotal	35	19	52	39	33	12	14	37	26	32
Orders modified	1	3	0	2	6	14	19	23	12	8
Total	36	22	52	41	39	26	33	60	38	40

[1] PI filed to enforce 20-day waiting period under H–S–R (Commission invoked § 7A(g)(2) for the first time—FTC v. Dana Corp.)

Senator GORE. I would like to call our next witness, the Honorable Mike Cody, who is Attorney General and Reporter for the State of Tennessee and is representing the National Association of Attorneys General. We are delighted to have General Cody here.

Let me say to him and to the two witnesses on the next panel that we are obligated to give up this room in less than 30 minutes, and I am sorry about that. But that is just the constraint that we are working under.

In introducing this witness, I would like to say how much I respect General Cody. We have been personal friends for a long time. He took over as Attorney General of Tennessee not long ago, and has been very active in the National Association. He has really done an outstanding job and has gained the respect of Republicans and Democrats alike throughout our state and those who work with him nationally.

And I am delighted that you are able to be here today. If you could summarize your very excellent prepared statement, rest assured that all of it will be in the record in full and we are delighted to hear from you.

STATEMENT OF W. J. MICHAEL CODY, ATTORNEY GENERAL AND REPORTER FOR TENNESSEE, ON BEHALF OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL; ACCOMPANIED BY PERRY A. CRAFT, DEPUTY ATTORNEY GENERAL

Mr. CODY. Thank you, Senator.

With me this morning is Perry Craft, the head of the consumer division in our office. I will try to be brief.

I appreciate the invitation to give testimony on the reauthorization of the Federal Trade Commission. Although I am appearing in part on behalf of the National Association of Attorneys General, certain clearly identified views are my own.

And I request, Mr. Chairman, that I be allowed, as you indicated, to submit a fuller and more detailed witness statement after the hearing.

The last formal authorization of the Federal Trade Commission ended in 1982. Since that time, the Commission's role has created much debate. Since the majority of the states have consumer protection acts which make reference to the Federal Trade Commission, actions by or affecting the Commission directly or indirectly affect the states' consumer legislation and the marketplace.

Due to the far-reaching effects of any action regarding the Commission, the Attorney Generals have tried to stay informed about the authorization process and have taken key positions on certain key issues. The Association recognizes that an exemption prohibiting rulemaking that regulates commercial speech based solely on the unfairness standard is unwarranted.

NAAG also opposes limiting the Commission's ability to enforce antitrust and consumer protection laws against professionals. We favor amendment of the antitrust laws to allow state attorneys general access to documents submitted pursuant to the Hart-Scott-Rodino Antitrust

Act, and repeal of the McCarran Ferguson Act which grants the insurance industry immunity from the antitrust laws.

Presently, the Commission cannot study the affordability and availability of insurance unless the appropriate Senate or House committee makes a request. In my opinion, the Commission should be authorized to promptly prepare a study fully exploring the reasons for the insurance crisis, an area of particular concern to consumers and the states.

Recently the Federal Trade Commission, and particularly Commissioner Calvani, established a working group with the National Association. This effort fostered better communication and resulted in a joint enforcement initiative, telemarketing fraud suits were simultaneously filed by several states and the Commission.

While I applaud these efforts and while the Commission still brings enforcement proceedings, other Commission action has been troublesome and has diminished the Commission's effectiveness in combating consumer fraud. Consumer protection and enforcement resources have been materially reduced or modified.

The Commission chose to alter well developed legal standards for proving deception and thereby made fraudulent schemes more difficult to stop. This alteration confused the law, downplayed the plight of consumers, and moved the law closer to caveat emptor.

By the Commission's deliberate action, perpetrators of consumer scams may now raise several defenses embodied in formal Commission statements and actually implemented in Commission decisions. NAAG opposed these administrative policy changes.

Although these policies have been relaxed in part, attorneys in my office in state court proceedings have heard these defenses invoked by defendant perpetrators of consumer fraud schemes. Since many state consumer protection acts contain provisions directing that Commission decisions serve as enforcement guidelines, the Commission's change in direction, in addition to increasing the Commission's burden, unfortunately increased the states' burden in proving consumer fraud.

Consumers are constantly subjected to fraudulent, unfair or deceptive schemes by perpetrators who often escape the consequences of their conduct. Virtually any local fraudulent scheme can easily be transferred to another state.

Perpetrators simultaneously or consecutively foist their schemes upon consumers in several states. Our methods for obtaining meaningful relief for consumer victims are not adequate. Enforcement efforts too often are piecemeal and hence not as effective as they ought to be.

To obtain more effective consumer enforcement, we propose that an amendment be made to the Federal Trade Commission Act to allow state attorneys general the power to enforce section (5)(a) 15 U.S.C. §45(a) with respect to "unfair or deceptive acts or practices in or affecting commerce."

Granting this authority to state attorneys general would dramatically increase the effectiveness of consumer protection enforcement, thus benefitting consumers nationwide and supplementing the Federal Trade Commission's efforts.

Individual state actions would have multistate or national effect. In contrast, the reality is that each state's individual proceedings have limited impact beyond a particular state's borders. Accordingly each state must devote its limited resources to repeat the efforts of other states.

The states already share with the Commission the responsibility for fighting consumer fraud. The states are often among the first to detect consumer fraud because of the heavy volume of complaints received by them from consumers across the country.

The states possess substantial experience in bringing consumer protection cases under standards analagous to section 5(a), and have in place staffs with knowledge and expertise to effectively battle multistate fraud under Federal law. All the states need is the authority to enforce (5)(a).

If states could bring actions under the Federal Act, our experienced attorneys could enforce traditional principles regarding deception and, more important, each case they bring would have broader impact, thereby significantly increasing the effectiveness of consumer protection enforcement.

Our national organization urges the Congress to consider enacting this proposal and appreciates the opportunity to make these brief remarks.

Senator GORE. Well, thank you very much.

Could you cite some real cases to illustrate your comment about your staff hearing defenses that come out of the recent FTC statements on deception?

Mr. CODY. Yes, Senator. In one case consumers in Chatanooga, Tennessee went to a company to get loans. They thought that when they got the loan, they were giving a mortgage on their house.

Later, after investigation, we learned that they were not giving mortgages but were in fact giving deeds to their houses rather than mortgages.

We filed suit in chancery court on that case, and the defense attorney raised the FTC deception standard statement to the effect that these consumers were not acting reasonably, because no one could imagine that a person would give up a deed to his house without first checking with a lawyer.

Fortunately, the judge agreed with us that often unsophisticated consumers are taken advantage of, and that reasonable consumer standard is appropriate.

In that case, we were able, to have the deeds transferred back to these poor, mostly uneducated consumers, total recovery in that case of approximately $273,000 benefitted very needy consumers in the Chatanooga area. Had the reasonable standard been adopted by the court, we believe that we would have been unsuccessful.

The point is that often the people victimized are not sophisticated. They are people who don't have the background and resources to fully examine all of the schemes to which they are subjected.

Senator GORE. Thank you very much. Senator McCain?

Senator MCCAIN. Mr. Chairman, in the interests of time, I have no questions now. I might want to submit a couple of questions for the record to the witness.

Senator GORE. Would you be willing to answer questions for the record?

Mr. CODY. I'd appreciate very much the opportunity to do that, yes.

Senator GORE. Fine, I have a number of them myself. And unfortunately, we're going to have to proceed that way. We have just had the bells for a vote on the floor. And we're going to ask Kathleen McDermott to come to the witness table at this time.

Thank you very much, General Cody. We'll have a number of questions for the record.

[The statement follows:]

STATEMENT OF W. J. MICHAEL CODY, ATTORNEY GENERAL, STATE OF TENNESSEE

Mr. chairman and members of the subcommittee: I appreciate your invitation to give testimony on the reauthorization of the Federal Trade Commission. Although I am appearing in part on behalf of the National Association of Attorneys General, certain clearly identified views are my own. Mr. Chairman, I request that I be allowed to submit a fuller and more detailed written statement after this hearing.

The last formal authorization for the Federal Trade Commission ended in 1982. Since that time, the Commission.s role has created much debate. Since a majority of the states have Consumer Protection Acts, which make reference to the Federal Trade Commission, actions by or affecting the Commission directly or indirectly affect the States' consumer legislation and the marketplace. Due to the far-reaching effects of any action regarding the Commission, the Attorneys General have stayed informed about the authorization process and taken positions on certain key issues.

The National Association of Attorneys General recognizes that an exemption prohibiting rulemaking that regulates commercial speech based solely upon an unfairness standard is unwarranted because of First Amendment and other protections.

The National Association of Attorneys General opposes limiting the Commission's ability to enforce antitrust and consumer protection laws against professionals.

The National Association of Attorneys General favors amendment of the antitrust laws to allow state Attorneys General access to documents submitted pursuant to the Hart-Scott-Rodino Antitrust Act and repeal of the McCarran-Ferguson Act, which grants the insurance industry immunity from the antitrust laws. Presently the Commission cannot study the affordability and availability of insurance, unless the appropriate Senate or House Committee makes a request. In my opinion, the Commission should be authorized to promptly prepare a study fully exploring the reasons for the insurance crisis, an area of particular concern to consumers and the states.

Recently, the Federal Trade Commission, particularly Commissioner Calvani, established a working group with the National Association of Attorneys General. This effort fostered better communication and resulted in a joint enforcement iniative: telemarketing fraud suits were simultaneously announced by several states and the Commission. While I applaud these efforts and while the Commission still brings enforcement proceedings, other Commission action has been troublesome and has diminished the Commission's effectiveness in combatting consumer fraud.

Consumer protection and enforcement resources have been materially reduced or modified. The Commission chose to alter well-developed legal standards for proving deception and thereby made fraudulent schemes more difficult to stop. This alteration confused the law, downplayed the plight of consumers and moved the law closer to caveat emptor. By the Commission's deliberate action, perpetrators of consumer scams now may raise several defenses embodied in formal Commission statements and actually implemented in Commission decisions.

The National Association of Attorneys General opposed these administrative policy changes. Although those policies have been relaxed in part, attorneys in my Office in state court proceedings have heard these defenses invoked by perpetrators of consumer fraud schemes. Since many state consumer protection acts contain provisions directing that Commission decisions serve as enforcement guidelines, the Commission's change in direction, in addition to increasing the Commission's burden, unfortunately increased the States' burden in proving consumer fraud.

Consumers are constantly subjected to fraudulent, unfair or deceptive schemes by perpetrators who often escape the consequences of their conduct. Virtually any local fraudulent scheme can easily be transferred to another state. Perpetrators simultaneously or consecutively foist their schemes upon consumers in several states. Our means of obtaining meaningful relief for consumer-victims are not adequate. Enforcement efforts too often are piecemeal; and hence not as effective as they ought to be. To obtain more effective consumer protection enforcement, the National Association of Attorneys General proposes the amendment of the Federal Trade Commission Act to allow state Attorneys General the power to enforce Section 5(a)(1), with respect to "unfair or deceptive acts or practices in or affecting commerce." Granting this authority to state Attorneys General would dramatically increase the effectiveness of consumer protection enforcement, thus benefiting consumers nationwide and supplementing the Federal Trade Commission's efforts. Individual state actions would have multi-state or national effect.

In contrast, the reality is that each state's individual proceeding has limited impact beyond that particular state's borders. Each state must devote its limited resources to repeat the efforts of other states. To illustrate, recently Tennessee alleged that a firm deceived consumers in a bait and switch scheme involving the sale of meat. We obtained a favorable negotiated judgment. Similar actions, before and after, were taken by other states. Duplicative enforcement actions are wasteful and permit offenders to continue operating by moving from state to state.

The states already share with the Commission the responsibility of fighting consumer fraud. The states are often among the first to detect consumer fraud because of the heavy volume of complaints received by them from consumers across the country. The states possess substantial experience in bringing effective consumer protection cases under standards analogous to § 5(a)(1) and have in place staffs with the knowledge and expertise to effectively battle multi-state fraud under federal law. All the states need is the statutory authority to enforce § 5(a)(1).

If states could bring actions under the Federal Act our experienced attorneys could enforce traditional principles regarding deception and more important, each case they bring could have a broader impact, thereby significantly increasing the effectiveness of consumer protection enforcement. The National Association of Attorneys General urges the Congress to enact this proposal.

Senator GORE. Mark Silbergeld, director of Consumers Union, has agreed to appear tomorrow in the hearing.

Ms. McDermott will not be able to appear tomorrow, so we want to invite you to present a summary of your statement at this time, and if we do not have time for questions because of our deadline and because of the vote, we will submit them in writing.

Would you be willing to respond to them?

Ms. MCDERMOTT. We'd be very happy to.

Senator GORE. At this time, if you could present a summary of your testimony, we'd appreciate it.

STATEMENT OF KATHLEEN E. McDERMOTT, REPRESENTING THE CHAMBER OF COMMERCE

Ms. McDermott. Certainly. We're very conscious of the time.

Thank you, Mr. Chairman and Senators.

My name is Kathleen McDermott. I'm a member of the law firm of Collier, Shannon, Rill & Scott here in Washington. And I'm here today on behalf of the Chamber of Commerce.

We appreciate this opportunity. I'll be very brief and summarize my statement as best I can.

I'd like to make two points. The Chamber strongly supports reauthorization. We share the views of all the witnesses here today that the failure to reauthorize the Commission for four years has compounded greatly confusion and uncertainty regarding the Agency's role, particularly its role in enforcing the nation's antitrust laws and the consumer protection laws.

Despite criticism about the agency in the past, there is no question that the Commission has a useful role in enforcing the nation's antitrust laws, and in preventing consumer injury that is due to commercial misconduct.

The Chamber also believes that the Commission's program of participating in Federal and State agency proceedings as well as testifying in court proceedings where appropriate is a means of making its considerable economic expertise available on a variety of competitive and consumer protection issues.

This is an important effort, and one that is utterly consistent with Congress' original intentions for the Agency.

The Chamber testified before this subcommittee in 1982 and recommended specific legislative solutions to a number of problems that it perceived with the Commission's enforcement of its antitrust mandate.

I'm not going to review all of those now. Many of the Chamber's concerns and suggested solutions were reflected in the Reauthorization Act which was passed overwhelmingly by the Senate in the last Congress.

The Chamber supported, and continues to support, the approach of that legislation.

I would just like to briefly review some of the issues addressed in that legislation, which continue to be of major concern to the Chamber of Commerce.

One overriding concern is the uncertainty that surrounds the definition of the term, unfair acts or practices, under Section 5 of the FTC Act.

In 1980, as the Chairman has explained, the Commission issued a unanimous statement explaining the circumstances under which consumer injury would be relied on as the basis for an unfairness finding.

Since that time the Commission has applied that standard, notably in its 1984 International Harvester decision. We find this a very helpful development.

No guarantee exists, however, that future Commissions will continue to apply what we view as a reasonable objective standard.

Therefore, we urge Congress to provide much needed guidance in this area by amending Section 5 to provide a statutory definition of unfairness.

The Chamber previously proposed a definition of unfair or deceptive acts or practices. Similar language was adopted in last year's bill with respect to unfair practices.

We believe that such an amendment would not impair the Commission's ability to protect consumers from truly unfair practices, but would provide much needed clarity and uncertainty for the Commission and the business community alike.

The Chamber also supports repeal of Section 5(m)(1)(B) of the FTC Act. This has been addressed by other speakers, and I will not elaborate.

Suffice to say that we view, at a minimum, it is necessary to amend that section to provide that it apply only to litigated cases, not consent decrees, and that the Commission be required to litigate the legality issue fully and fairly against all industry members that may be affected in civil penalty proceedings.

Other issues which the Chamber continues to be concerned include requiring a prevalence standard in Commission rulemaking, and increased Congressional oversight, consistent with constitutional requirements, over the FTC.

We also support preservation of the safeguards contained in the 1980 improvements act with respect to intervenor funding.

In conclusion, I can only reemphasize that the Chamber believes strongly that it's time to reauthorize the Commission, and we urge you to do so.

Senator GORE. We're delighted with that view, as expressed by you on behalf of the Chamber, and comforted that virtually all of our witnesses are stating their strong support for this reauthorization.

And I think we're building a record in this hearing, and hopefully tomorrow as well, that will assist us in our efforts to get speedy authorization.

And I'm going to suggest that we submit questions for the record. You've said you would answer them for the record, and your full statement will be included.

I apologize that we don't have a chance for an interchange now. And I'd again like to express the appreciation on behalf of the Subcommittee to Mr. Silbergeld for agreeing to appear tomorrow.

We will be here at 10:00 o'clock tomorrow morning, and Mark Silbergeld will be our leadoff witness, appearing alone rather than part of a panel, and we appreciate that.

And we will try to get a more timely start tomorrow and continue these hearings.

To all of our witnesses today, thank you very much, and we're adjourned.

[The statement follows:]

STATEMENT OF KATHLEEN E. MCDERMOTT, REPRESENTING THE U.S. CHAMBER OF COMMERCE

The U.S. Chamber of Commerce appreciates this opportunity to express its views on the need for reauthorization of the Federal Trade Commission (FTC). The reauthorization process is an opportunity for Congress to establish ground rules for the

agency's future administration of Section 5 and to modify policies that have benefited consumers and the business community alike. In particular, the Chamber supports several amendments to the FTC Act that would provide much needed clarification and guidance to both the business community and the Commission in interpreting the Commission's mandate from Congress.

Despite criticism about the agency in the past, there is not question that the Commission has a useful role in enforcing the nation's antitrust laws and in preventing consumer injury from commercial misconduct. The emphasis on economic analysis and the understanding of the respect for market forces in maintaining our competitive economy, which have characterized the Commission's enforcement decision in recent years, have been a salutary development. The Chamber believes that the Commission's program of participating in federal and state agency proceedings, whereby it has made its considerable economic expertise available on a variety of competitive and consumer protection issues, is an important effort, one that is consistent with Congress's original intentions for the agency.

While the Chamber applauds the Commission's current course, it recognizes that the agency's policies and programs potentially are subject to radical shifts and changes of direction with every change of the individuals who constitute the Commission. This creates uncertainty and confusion, which Congress can and should dispel. As the Commission itself has recognized, it is "entirely proper" for Congress to "provide as much guidance as feasible to administrative agencies" in the form of more precise statutory standards for the benefit of both the "regulated" and "regulator."[1]

For several years, consumers and the business community have operated in a climate of uncertainty and confusion with respect to the jurisdiction of the Commission and the standards of behavior deemed inappropriate by that agency. Although the Chamber has previously focused on the uncertainty caused by a lack of definition of "unfair or deceptive acts or practices" and "unfair methods of competition," the failure of Congress to reauthorize the Commission for the last four years has led to confusion over more than just those terms; it has created doubt as to the very role of the agency. The issues that will be before this Subcommittee as the reauthorization process proceeds are too important to leave in such an indefinite state.

When the Chamber testified before this subcommittee in 1982, it recommended specific legislative solutions to a number of what it perceived to be long-standing problems with the Commission's enforcement of its mandate. Many, but not all, of the Chamber's concerns and suggested solutions were reflected in the FTC Reauthorization Act passed overwhelmingly by the Senate in the last Congress. The Chamber supported and continues to support the approach of that legislation. This morning I would like briefly to review those issues addressed in last year's bill, which continue to be of chief concern to the business community.

One overriding concern continues to be the uncertainty that surrounds the definition of the term "unfair acts or practices" under Section 5 of the FTC Act. At some periods in the past the Commission has operated on an essentially unrestricted basis in determining what constitutes "unfair" acts or practices. In particular, relying on consumer injury as the basis for a finding of unfairness has at times permitted the agency to use subjective perceptions of consumer impact as an excuse to attack practices that involved neither falsehoods, reckless claims, or intentionally misleading practices. In 1980, however, the Commission issued a unanimous statement explaining the circumstances under which consumer injury would be relied on as the basis for an unfairness finding.[2] Under that formulation, an actionable consumer injury must be substantial, not outweighed by an offsetting consumer benefit that the practice produces, and that consumers reasonably could not have avoided.[3] The Commission since has applied that standard, notably in its 1984 International Harvester decision.[4] No guarantee exists, however, that future Commissions will continue to give the term a similarly reasonable, objective construction. Therefore, we urge Congress to provide much needed guidance in this area by amending the FTC Act to provide a statutory definition. Previously, the Chamber has propose a standard to define "unfair or deceptive acts or practices" to be those that:

> . . . directly cause or may foreseeably result in substantial economic injury to consumers and such injury is neither reasonably avoidable by consumers themselves nor outweighed by countervailing benefits to consumers on competition.

Similar language was adopted by the Senate last year to define "unfair" practices under the FTC Act. Such an amendment would not impair the Commission's ability to prevent actual unfair practices. Rather, it would inject clarity and certainty into an area of the law that otherwise will continue to confuse both business and consumers as to the required standards of behavior.

The Chamber also supports repeal of Section 5(m)(1)(B) of the FTC Act, which authorizes the Commission to seek civil penalties of up to $10,000 per violation against companies for violations of cease and desist proceeding. In effect, Section 5(m)(1)(B) turns cease and desist orders into general rules without even the minimal due process applicable to agency rulemaking under the Administrative Procedure Act. The section's chief defect is its failure to safeguard a respondents' right to a reasonable opportunity to defend the legality of its conduct. In addition, as the Chamber has pointed out on prior occasions, the Section suffers from vague and ambiguous drafting, leaving it uncertain, for example, whether civil penalties could be premised upon in violation of a consent order. The Chamber believes that the only sensible solution to the Section 5(m)(1)(B) problems is repeal of the provision in toto. In any event, basic fairness and due process demand at a minimum that the Section apply only to litigated areas and that the Commission be required to litigate the legality issue fully and fairly against all industry members that may be affected before civil penalties can be imposed.

Other issues with which the Chamber continues to be concerned include requiring a "prevalence" standard for Commission rulemaking and increased or Congressional oversight of the FTC. Requiring the Commission to determine that an allegedly deceptive or unfair act or practice is prevalent in an industry before embarking on industry-wide rulemakings would, we believe, do much to avoid wasteful expenditures of Commission and private resources on ill-conceived rulemakings. Regular Congressional oversight, within the scope of the law, also would provide a better check on agency rulemaking and would help to prevent regulatory abuse. The Chamber also supports preservation of those safeguards contained in the 1980 FTC Improvements Act, which prevent abuses in the FTC's administration of this intervenor funding program.

Overall, the Chamber believes that the above-mentioned reforms are essential to providing a more predictable climate for businesses and consumers. These reforms are timely; they will provide necessary guidance to the FTC and allow the FTC to play a vital role in protecting competitive business practices and the interests of consumers.

Finally, we reemphasize the need to reauthorize the FTC during this Congressional session. We hope that this Subcommittee and Congress will take swift action to reauthorize the FTC.

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[1] Letter of Commission per Chairman Miller to Senators Packwood and Kasten dated March 5, 1982 at pp. 8-9.

[2] Letter from the Commission to Senators Ford and Danforth dated Dec. 17, 1980 ("Unfairness Statement").

[3] Unfairness Statement at pp. 5-7.

[4] International Harvester, Co., 104 F.T.C. 949, 1060-1067 (1984).

(Whereupon, at 11:40 a.m., the subcommittee adjourned.)

AUTHORIZATION OF THE FTC

THURSDAY, FEBRUARY 5, 1987

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON THE CONSUMER
Washington, D.C.

The Committee met, pursuant to notice, at 10:05 a.m., in Room SR-253, Russell Senate Office Building, the Hon. Albert Gore, Jr., [chairman of the subcommittee] presiding.

OPENING STATEMENT BY SENATOR GORE

Senator GORE. Ladies and gentlemen, we are going to go ahead and start this our second hearing on the reauthorization of the FTC.

Yesterday we heard from all of the Commissioners, the National Association of Attorneys General, and the Chamber of Commerce. Today we will begin with Mr. Mark Silbergeld who will testify on behalf of the Consumer groups. We were to hear from him yesterday, but he was kind enough to agree to testify today instead because of the unusual time constraints we encountered yesterday.

We will also hear today from witnesses on three panels to discuss controversial issues surrounding the reauthorization of the agency. These issues include the authority of the FTC over advertising and agricultural cooperatives, as well as the prohibition on the FTC to investigate insurance matters.

So without any further ado, let me welcome our first witness, Mark Silbergeld, Director of the Washington office of Consumers Union, speaking on behalf of the Consumers Groups. We appreciate your cooperation and your testimony.

Without objection, the full text will be included, and if you wish to present a summary that will be great. If you want to present more than that, that will be fine, too. But please proceed.

STATEMENT OF MARK SILBERGELD, DIRECTOR, WASHINGTON OFFICE, CONSUMERS UNION

Mr. SILBERGELD. Thank you very much, Mr. Chairman. I will present only a summary, but I must at some point in the time allotted to me comment on some of the responses that Chairman Oliver offered to questions yesterday.

To summarize the testimony that I have presented in writing, I would say that we do not believe the Commission has been performing well. That was one of the questions the Committee had, and the answer to us is clearly "no." If, at least politically speaking, the Commission under Chairman Pertschuk bit off more than it could chew, then I would have to say the Commission under Chairman Miller and Chairman Oliver is by contrast suffering from anorexia nervosa.

But we think that you should reauthorize it anyway. Why? Because the function that it performs is of extreme importance to consumers and to fairness and competition in the marketplace. So we are asking the Congress to perform cryogenesis on the body and to try and preserve it until a cure can be found.

We think that to do this the Committee needs to decouple controversial issues from reauthorization, and to explore those issues which have been pressed upon the Committee by special interests for oversight hearings which should follow reauthorization.

Most especially I am concerned about special treatment for advertising under the FTC's rulemaking authority to enforce the Unfairness Doctrine. This issue, as you yourself pointed out yesterday, arose in 1980 as a result of the Kid Vid proceeding, and I very strongly believe that putting the criteria contained in the Commission's protocols for Unfairness into the Act should satisfy the advertising community.

If that is not enough, then I would have to say that we would seriously consider opposing an reauthorization bill that gives those interests permanent special treatment that other marketing practices do not have.

I must digress from my testimony at this point, however, to point out that Chairman Oliver's response to that question was, to say the least, remarkable. On the one hand he said he concurred in the level of the budget request in the authorization for appropriations, and on the other hand he said go ahead and take Unfairness jurisdiction away because they do not have the money to do it.

Then he said, "But do not take away jurisdiction to deal with the agricultural co-op questions, because shortage of money should never be a basis for determining jurisdiction." It has been said that a foolishness consistency is the hobgobblin of little minds. I do not know of any such similar quote with respect to foolish inconsistencies, but I have seldom heard inconsistencies quite as foolish.

Jurisdiction should not depend on the dollars, and exercise of selection of priorities and exercise of jurisdiction should neither depend on the dollars. If there is an important issue that requires an unfairness rulemaking with respect to advertising, then the Commission should make that a priority. Commissioner Bailey pointed out several rules now on the books, most of which are not even controversial at this point, which rest in part on the Commission's authority to make rules under the Unfairness Doctrine that address at least in part advertising—not wholly, because they also address, at least as a remedy.

In my own testimony, I identify two rules, the R value labeling rule for home insulation, and the octane posting rule for motor gasoline which raised the spectre of the Commission having to go the back door if it faces that kind of a jurisdictional limitation, and yet more controversy and litigation and appeal down the road over their authority; or, alternatively, the Commission losing those legal arguments and being unable to cure practices that everybody, including I believe the members of this Committee, would believe should be within the Commission's reach.

Finally, Mr. Chairman, I would note with respect to Unfairness rulemaking jurisdiction that industry generally, including the advertisers, tend not to like whichever form of Commission proceeding, rulemaking or litigation, they are being visited with at the moment. If rulemaking is the order of the day and aggressively enforced, then they say let us go with the case-by-case method. If there are cases against particular firms, they make the obvious and correct constitutional argument that it is unfair to single out particular petitioners when the practice is widespread throughout the industry. There should be rules. That is how we got the current rulemaking provisions in the first place.

When neither is being vigorously pursued, which I believe to be the case now, they try to take what they can get.

In closing, I would say that we do agree with Chairman Oliver on one major issue. That is, that the Commission should have its authority restored to study practices in the insurance industry.

Thank you very much, Mr. Chairman. I would be happy to answer questions.

Senator GORE. Well, thank you very much. I appreciate that summary. I commend the rest of your text to any who look at this hearing record, and any in this room. It is an excellent statement, and we certainly appreciate it.

How would you rate the current FTC on its law enforcement efforts, if you were given a 1 to 10 scale, with 1 being the least active, and 10 being the most active in law enforcement?

Mr. SILBERGELD. Oh, I would have to say maybe a 2, maybe a 3. There is a lot of activity. You have to take into account of course both the fact that they have less funds than they have had traditionally, if you adjust for inflation, but also the fact that the Chairman of the Commission since the fund cuts started have acceded to those budget requests.

But even given that, there are a lot of cases, but the cases are such things as protecting people who may be the victims of diamond investment fraud, a lot of filings to get back pennies on the dollars on behalf of the consumers who have been defrauded by bankrupt firms, very little addressed to major marketing practices which affect literally millions upon millions of consumers across the Nation.

Senator GORE. Well, that is interesting, because there is a widespread criticism of the FTC for lack of enforcement, and yet there is some activity in some areas, and I think your statement reconciles those two realities.

What are the practical consequences for consumers and for business of the lack of vigorous enforcement in the areas where it is most needed?

Mr. SILBERGELD. Oh, I think the practical effect is that there is a signal to the business community, or at least to elements in the business community, that practices might have come under scrutiny ten years ago, even six or seven years ago, but are going to be winked at now, looked at lightly because of economic theories that have been advanced on the appropriateness of case selection and the exercise of the Commission's jurisdiction.

I noticed last year the recurrence of superiority claims, product differentiation claims for a particular nationally distributed brand of gasoline which started to get close to the old kinds of octane claims, without actually using the octane claims directly, and apparently nobody at the Commission even twitched a muscle over that. Those sorts of things are beginning to show up again.

While I certainly would not say that advertising is in the state that it was before Chairman Kirkpatrick took over the agency in the early 1970s, I would say that over the long-term if this attitude continues that we will start to see it.

Senator GORE. And of course there is the loss of the deterrent effect.

Would your position on the issue of the FTC's unfairness authority to regulate advertising result in a reduction in the amount of information which is available to consumers?

Mr. SILBERGELD. I certainly would not think so. It has been the theory of the last two Chairmen, including the incumbent, Mr. Miller and Mr. Oliver, that when you attack factually questionable claims in advertising, you at the same time create a disincentive for the advertiser to include any factual information in the advertising, thereby discouraging the use of factual advertising in any sense and the retreat to mere puffery or image advertising, and therefore the Commission should not really make attacks under its Unfairness or Deception jurisdiction on ads. I have seen that stated as a theory. It makes me wonder how either of those Chairmen believe that any deception charge could be laid to advertising, and I think it is one of the reasons you see less.

I think that that is strictly theoretical. I know it is taught in a number of schools of marketing in economics. I would ask the Commission to come forth with some kind of case studies, the way a good academic would in one of those schools of marketing or economics, that shows that after the Commission sued X, Y, and Z on a deception or unfairness claim related to specific factual claims, direct or implied, in advertising that the advertising of that particular advertiser sifted heavily to less informative forms of advertising.

If they could make those kinds of showings, we could have very interesting oversight hearings. But I have not seen them yet.

Senator GORE. The National Association of Attorneys General Advocates—excuse me, the witness we had yesterday, Mike Cody, speaking in behalf of the National Asssociation of Attorneys General, advocated expanded authority for State Attorneys General. How does the

Consumers Union, or how do the consumers groups react to this proposal?

Mr. SILBERGELD. I would think that that would be an excellent idea. The Commission itself has in some respects hampered the ability of the attorneys general to enforce little FTC acts by some of the self-imposed restrictions such as their own policy statement on the meaning of the term "deception."

The attorneys general and assistant AGs for the consumer divisions that I have talked to find that they are taking up a burden which rightly belongs to the FTC—some of them welcome it; some of them like the expanded activity of their own offices with respect to advertising and other marketing practices; others have not the budget for it and feel that the Commission is imposing the Commission's Federal responsibilies upon itself.

Commissioner Bailey has said that the State of New York has become the primary enforcer of the Federal Trade Commission Act. I would think that as insurance against the Federal Trade Commission's long-term abdication of its responsibilities, that the States' attorneys general should have the authority to do so.

Senator GORE. Well, on the other hand, there has been some criticism of the prospect of having to deal with 50 States enforcing the FTC Act, and then another one, as well, all of them having varying standards and agendas. Would the NAAG proposal create confusion?

Mr. SILBERGELD. Well, it is possible, but the cure for that is for the Federal Trade Commission itself to take the responsibility in the areas that are most controversial and most problematic. The short answer is that when the FTC acts, that influences the State standard. And if the problem arises because the FTC is abdicating responsibility in problem areas, then that result is unfortunate but necessary. So let us see the FTC act and set the standards for the States so we do not have such diversity.

Senator GORE. I agree with that. I think my time has expired.

I do not know what the protocol is here, but the Ranking Minority Member of the Full Committee arrived first.

Senator DANFORTH. Mr. Chairman, I do not have any questions for this witness. I really came here today to express support to you for your efforts. They will be very difficult, Herculean efforts, to try to pass an FTC Authorization bill.

I cannot remember when in the 1970s one was passed, sometime in the mid-1970s. Then there was a terrific battle to get one passed in 1980. At that time, Senator Ford was the Chairman of the Subcommittee, and I had the dubious distinction of being the Ranking Minority Member on the Subcommittee, and we spent months trying to hash out these same issues. I mean, it is an ongoing saga of FTC authorization bills.

Last year of course we were able to pass a bill in the Senate, and we were not able to make progress—we made some progress, but not enough, in conference to get the bill finally enacted.

So I am just here to express my admiration for your Sisyphus-like efforts, and to express my support. We will be doing our best to work with you in getting this passed.

Senator GORE. Well, thank you very much. Senator McCain and I are determined to move forward, standing on the shoulders of giants that preceded us, and I want to recognize him at this time.

Senator MCCAIN. Thank you, Mr. Chairman. And I would like to thank my colleague, Mr. Danforth, for that encouraging note as to how we are going to be spending a lot of our time in the next few months.

I really have no questions for the witness, and I apologize for being late. Both Senator Gore and I are on the Armed Services Committee, and we are receiving testimony this morning from the Service Chiefs, and I do apologize for being late.

Mr. Silbergeld, I just wanted to ask one question. You mentioned that there really would not be a need for the State Attorneys General to take over these responsibilities if the FTC was doing what you believe is their appropriate and indeed mandated job tasks as described by Congress.

Could you specify a couple of those areas where you feel they are particularly not performing their duties?

Mr. SILBERGELD. Well, I would say that the whole area of advertising has been sort of removed—that is, by major national advertisers—has been removed from FTC's scrutiny simply as a matter of economic philosophy. I think what you see as a result is that States like New York are bringing major cases not in any one area, not some particular kind of claim that is the problem, it is just that the whole area has been abdicated under the economic theory I just a few moments ago outlined that former Chairman Miller and Chairman Oliver seem to share about discouraging informational advertising.

That is a major one. The State Attorneys General in any event would have major responsibilities, but really traditionally they have addressed such problems as the misrepresentations and frauds of local retailers, regional retailers, both in advertising. Things such as for instance Maryland last year suing a major department store for false pricing claims regarding bedding. Well, the department store does business in the general—that is to say, this particular part of it is part of a national chain, but the particular department store does business here in the Washington-Baltimore area; it does not do business at least under that name and with the same management in Los Angeles or Boston or Tallahassee—so that is typically something that the State AGs deal with.

Typically the State AGs do not sue major national firms for claims, advertising claims that appear in nationally distributed magazines or on network TV. Now you are finding in the State of New York at least, and some others, beginning to do that sort of thing because the FTC is not doing it. And it is changing the balance of their workload and their responsibilities, and increasing the financial burden on them because if they want to do what they think the FTC should be doing, they have to either get more money from the legislature, which they find very dif-

ficult, or take some money away from dealing with the local retailers who engage in the kinds of practices the FTC should not really be spending its resources on.

Senator MCCAIN. So advertising is one of the areas?

Mr. SILBERGELD. Advertising I think is the major area where the State AGs have expressed concern that they are having to take up the burden that the Federal Trade Commission should be dealing with, because it deals with nationwide practices.

Senator MCCAIN. Thank you for your testimony this morning, Mr. Silbergeld.

Mr. SILBERGELD. Thank you.

Senator GORE. Thank you.

Two more brief questions. Along with other witnesses who have appeared before the Committee during these hearings, the consumer organizations for whom you are speaking advocate elimination of provisions which currently limit the FTC's authority to investigate or study the insurance industry. Since the congressional committees with legislative jurisdiction are already authorized to direct the FTC to undertake such investigations, what do you think this additional authority would yield?

Mr. SILBERGELD. I believe it would yield studies and economic reports in areas that do not come to the Committee's attention, or which may not be of particular interest to the committees perhaps because the committees have not seen in the rush of their other business the indicia of a problem that the Commission staff assigned responsibility for that area has seen.

For instance, Medigap, which Commissioner Bailey mentioned yesterday, normally would come to the attention of the committees that deal with health insurance. Now in the House of course that happens to be the committee has has jurisdiction over the Federal Trade Commission. In the Senate, it is not. So you are not likely to get a great deal of interest in urging the Commission to do it, but if the Commission had the authority to do it on its own, perhaps notifying Congress whenever it initiated one of these studies, it might develop evidence—if the evidence is there and the Commission does it job—that calls the attention of the appropriate Congressional Committees to a problem the committees either did not know existed or did not know were as serious as the Commission's study finds them to be.

We are not asking for enforcement authority; we are only talking about study authority. It seems to me that the exemption, and the larger exemption under the McCarren-Ferguson Act, would have to be subject to periodic congressional assessment as to whether or not the States are doing the job that they were expected to do when that Federal abstension was adopted as policy.

The only way to know that is to give the Commission the authority to at least inquire and report to Congress.

Senator GORE. Very good. Well, thank you very much.

I will recognize Senator Breaux, if he wants to make a statement. If not, we will go ahead to the first panel.

Did you have any questions of this witness?

Senator BREAUX. No, thank you.

Senator GORE. Thank you very much for coming, and again for courtesy in rescheduling.

[The statement follows:]

STATEMENT OF MARK SILBERGELD, DIRECTOR, WASHINGTON OFFICE CONSUMERS UNION

Mr. Chairman and Members of the Subcommittee, Consumers Union [1] appreciates this opportunity to state its views on the proposed reauthorization of the U.S. Federal Trade Commission. Consumer Federation of America [2], the National Consumers League [3], Public Citizen's Congress Watch [4], and the U.S. Public Interest Research Group [5] join in this statement.

The Federal Trade Commission is an essential force for fairness in the national marketplace for consumer goods and services. It is charged by law with prohibiting unfair or deceptive acts or practices and unfair methods of competition.

It is clear that the FTC has not fully achieved its Congressional mandate. Never has it had sufficient resources to do so. Indeed, when the Congress in 1914 created the FTC, it did not expect the agency ever fully to achieve its ends, for it foresaw a marketplace in which the practices of sellers would be ever-changing, chameleon-like, in response to changing conditions and to the development of the law under the new legislation.

Further, the agency's own view of its mission—and the view of the Congress as well—change cyclically, so that the FTC alternates periods of activism with periods of relative inactivity. Nonetheless, few would deny that, on the whole, the marketplace is more honest, more fair and more competitive because, since 1914, we have had a Federal Trade Commission.[6]

In short, the relative inadequacy of the Federal Trade Commission during the "down" phase of this cycle should not dissuade Congress from renewing America's commitment to an honest and competitive marketplace for consumers. It has been seven years since the Congress has done so? We believe that it is time to do so again. Reauthorization for three years would relieve the agency of the resource drain that goes into annual efforts to obtain reauthorization and in the demoralizing effect that the lack of Congressional endorsement for the agency's basic mandate has on FTC career staff.

Why, this subcommittee might well ask, do we want the Congress to reauthorize an agency that we believe has performed very poorly for seven years? The answer is simple. Cryogenesis—preserving a life in danger by freezing it until a cure can be found—may work in this case. The function of the Federal Trade Commission is so essential to consumers that its performance must be evaluated in the long view, taking into account the cyclical nature of its activity. We believe that the agency's performance and alleged shortcomings should be the subject of a separate oversight hearing once it has been reauthorized. Authorization should be "decoupled" from oversight in order to achieve it promptly and in the least controversial setting possible.

Still, I must state that the consumer organizations whose positions I relate to you today do not support reauthorization at any cost. Since the last reauthorization in 1980—indeed, since before that time—the Congress in its legislative, appropriations and erstwhile legislative veto functions has been beset by the pleas of special interests who want to carve their own most sensitive problems, in whole or in part, out of the FTC's jurisdiction. Soft drink bottlers, brewers, used car dealers, funeral directors, agricultural cooperatives, doctors, lawyers, advertisers and advertising agencies all profess to believe in the agency's functions—except as it applies to some sensitive part of their own marketplace practices.[7] Reauthorization legislation has been the vehicle for some of these self-serving efforts.

These special interest pleas, some successful and some unsuccessful in past years, appear to have been reduced in the context of this current reauthorization process primarily to the claim of advertisers and advertising agencies that the Commission should not have jurisdiction to adopt trade regulation rules governing unfair industry-wide advertising practices.

The request for special treatment of advertising arose in 1980 in response to the FTC's then-ongoing children's advertising rule. The meaning of "unfair" was said to be so vague that it gave an administrative agency in terrorem enforcement powers. Whatever the merits of that argument, the FTC has long since adopted a policy statement identifying the criteria for determining a practice to be "unfair" that is satisfactory to the Congress. We see no continuing reason for the advertising community's request for special treatment.

Such rules now are considered appropriate when applied to labelling requirements, to direct marketing practices such as door-to-door sales, telephone sales, free sample promotions, other promotional schemes and sales practices. But, for reasons that are neither clear nor justified by fact, major advertisers apparently continue to request such a restriction in this reauthorization legislation. We will oppose on principle an authorization bill that contains such special treatment for advertising practices.

We also believe that a special exemption for advertising could present unforeseen practical difficulties. For instance, what treatment would be afforded the situation where (1) an advertising practice is a major, but not the sole, component of a marketing practice (2) the FTC finds the illegality to rest at least in part on its unfairness jurisdiction and (3) the problem is best cured at least in part, according to the Commission, by a labelling requirement? Two such existing rules are the motor fuel octane posting rule and the home insulation R-value labelling rule.

Could the FTC proceed to rulemaking or could it not in such circumstances? Could it proceed to rulemaking only by ignoring the advertising-related elements of the practice even though they are clearly present and relevant? Could it proceed to rulemaking only if it ignores the unfairness basis of jurisdiction though that clearly is present and proceeds solely on a deception theory? In our opinion, these questions will inevitably present the FTC with unnecessary difficulties in solving marketing practice problems and long litigation over the parameters of the exception.

Further, industry preferences for rulemaking or administrative litigation are also cyclical—it seems always to prefer the one it currently is not experiencing. Vigorous prosecution of selected firms for practices that are industry-wide bring demands for prospective rulemaking in the name of fairness, while vigorous rulemaking is described as less appropriate than the case-by-case approach. When neither rulemaking nor prosecution is vigorous—as has been the case in the 1980's—the industry tries to get whatever it can in the way of additional restrictions.

In summary, we find no justification for special treatment of advertising under the FTC's rulemaking authority, believe that such treatment could be mischievous and oppose its inclusion in reauthorization legislation.

There is one partial restoration of FTC jurisdiction that we believe is timely for inclusion in reauthorization legislation. For some years, the Congress has interpreted the federal abstention from insurance matters to mean that the FTC does not have the authority to perform even economic studies of the insurance industry (except studies requested by both the House and Senate legislative committees). We believe that the renewed interest in insurance-related issues at the federal level—especially product and professional liability insurance coverage issues within the jurisdiction of this Committee, but including other competition-related insurance questions as well—justify clarification that the FTC has the power to conduct such economic studies.

In conclusion, Mr. Chairman, we strongly support reauthorization of the Federal Trade Commission, with a restoration of the agency's authority to conduct economic studies of the insurance industry, but devoid of special jurisdictional treatment for advertising or any other practices. We hope the Committee and the Senate will act expeditiously and stand ready to assist this Subcommittee to achieve that goal.

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[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education and counsel about consumer goods and services and the management of family income. Consumers Union's income is derived solely from the sale of Consumer Reports, its other publications and films. Expenses of occasional public service efforts may be met, in part, by

nonrestrictive, noncommercial grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports, with approximately 3.5 million circulation, regularly carries articles on health, product safety, marketplace economics and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[2] Consumer Federation of America is a coalition of over 200 national, state and local consumer, senior citizen, labor, farm, cooperative and rural organizations which together represent more than 30 million people.

[3] The National Consumers League, the pioneer consumer organization in the country, has worked for safety and fairness of consumers and workers since 1899. Today, the League works to insure that hard-won consumer and worker protections are enforced and updated by supporting necessary regulatory action.

[4] Public Citizen is a nonprofit research and advocacy organization founded by Ralph Nader in 1971, which works on behalf of its over 60 thousand members and all consumers. Congress Watch is the legislative advocacy arm of Public Citizen.

[5] U.S. Public Interest Research Group is the national lobbying office for state PIRGs around the country. PIRGs are nonpartisan, nonprofit advocacy groups.

[6] FTC Chairman Oliver may be among the few. Given his attacks on government regulation of advertising (address to the Association of National Advertisers, Hot Springs, Virginia, October 29, 1986) and on FTC and Justice Department antitrust regulation (address to the Antitrust Law Section, American Bar Association, August 12, 1986), it would seem appropriate for the Subcommittee to inquire as to whether he believes that the agency on the whole has provided a benefit to the public.

[7] This is in addition to the unsuccessful pleas of the agency's own recent leadership, which asked Congress to throw it in the river after binding its hands with the ropes of a new, restrictive definition of the term "deceptive", so that the FTC could perform the Houdini-like trick of fulfilling its mandate with reduced resources while being required to litigate to the hilt the basic assumptions of the law of deception that have been built up over the past seventy years.

Senator GORE. Our first panel is now invited to the witness table. It consists of Mr. Glen Wagner, General Counsel of Milk Marketing, Incorporated, who is representing the National Council of Farmer Cooperatives; and he is accompanied by Mr. William Quarles, Vice President for Government Affairs of Sunkist Growers, Incorporated, in California.

Also, Mr. Donald Randall, Executive President and General Counsel for the National Independent Dairy Foods Association.

You are both most welcome. We are delighted you could help us with this hearing today. Without objection, the entire text of your prepared statements will be included in the record, and we invite you to present a five-minute summary of your views at this time.

We will begin with you, Mr. Wagner. Good morning.

STATEMENT OF GLEN WAGNER, GENERAL COUNSEL, MILK MARKETING, INC., REPRESENTING THE NATIONAL COUNCIL OF FARMER COOPERATIVES; ACCOMPANIED BY WILLIAM K. QUARLES, VICE PRESIDENT, GOVERNMENT AFFAIRS, SUNKIST GROWERS, INC.

Mr. WAGNER. Thank you, Mr. Chairman.

I do have a short, one-page statement that will refer to portions of the statement that has been distributed and is in your hands.

The first point I would make is that the marketing order program under the 1937 Act provides for open hearings conducted by the Department of Agriculture. These have been, and are being used by the industry. The program is cost-effective, and the industry bears much of the cost of the administration through normal assessments.

The Secretary of Agriculture administers the program, reviews the workings of the audit and enforcement provisions, and the program has worked and responded to various supply conditions over the years. Any regulations issued are done so by the Secretary of Agriculture. It is dif-

ficult to comprehend why the FTC should feel compelled to study, or investigate, or duplicate other studies of the actions of the Secretary of Agriculture.

We reaffirm our support for the program and the statement that the Secretary of Agriculture has balanced the public interest among handlers, consumers, and producers.

The second point I would refer to is Capper-Volstead. The Capper-Volstead Act is as relevant to the needs of the farmers and growers of today as it was when it first became law. The safeguards contained therein are sufficient through the review provisions contained in Section 2. In addition, the courts and the Department of Justice provide adequate enforcement of antitrust issues or concerns.

Finally, the National Council of Farmer Cooperatives, on whose behalf we are appearing here, favors continuation of the so-called compromise language on restricting the FTC role in the agricultural co-op field. This language has been in effect since 1980 and was reaffirmed last year by House and Senate Conferees. There is no need for the FTC to review the actions of the Secretary of Agriculture. As noted above, we would request that the present provision be extended in the law.

We are open for questions.

[The statement follows:]

STATEMENT OF THE NATIONAL COUNCIL OF FARMER COOPERATIVES

Mr. Chairman and members of the Subcommittee. This statement is submitted on behalf of the National Council of Farmer Cooperatives.

The National Council is a nationwide association of cooperative businesses which are owned and controlled by farmers. Its membership includes 90 regional marketing and farm supply cooperatives, 37 banks of the cooperative Farm Credit System, and 32 state councils of farmer cooperatives. National Council members handle practically every type of agricultural commodity produced in the U.S., market these commodities domestically and around the world, and furnish production supplies and credit to their farmer members and patrons. Two-thirds of U.S. farmers are affiliated with one or more cooperatives. The National Council represents about 90 percent of the more than 5,600 farmer cooperatives in the nation, with a combined membership of nearly 2 million farmers.

My name is Glen Wagner and I am General Counsel of Milk Marketing, Inc., a dairy cooperative headquartered in Strongsville, Ohio. With me today is William Quarles, Vice President Government Affairs of Sunkist Growers, a citrus marketing cooperative headquartered in Van Nuys, California. The events discussed in our testimony are offered as background, so that you will better understand our concerns. Our purpose in being here today is to attempt to assist you in further clarifying the roles of the Federal Trade Commission and the Department of Agriculture concerning their respective jurisdictions over the activities of farmer cooperatives and the administration of marketing orders.

As you know Congress reaffirmed the primary jurisdiction of the Secretary of Agriculture over farmer cooperatives and marketing orders by providing in the FTC Improvements Act of 1980 that the Commission should not use any funds for the purpose of conducting any study, investigation, or prosecution of any agricultural cooperative for conduct which, because of the provisions of the Capper-Volstead Act, is not a violation of any federal antitrust act or the Federal Trade Commission Act, or for the purpose of studying or investigating any marketing orders. These prohibitions are currently in effect under the terms of the continuing budget resolution for fiscal year 1987.

CAPPER-VOLSTEAD

Section 1 of the Capper-Volstead Act provides that producers of agricultural products may act together in corporate or non-corporate associations, operated for the mutual benefit of the member producers in collectively processing, preparing for market, handling, and marketing their products. It also authorizes them to have marketing agencies in common and to make the necessary contracts and agreements to effect such purposes.

The principal reasons for enactment of Capper-Volstead in 1922 are equally compelling today. They include the following:

— Each of the nearly 2 million farmers in the United States acts independently and makes major financial commitments to production long before market demand is known.

— Farmers face far greater production risks than other businessmen because of weather, disease, and other.

— Once farmers decide on production strategies they cannot easily change without incurring major financial loses. Unlike other businesses, farmers cannot shift production in midstream because of changes in market demand.

— Most farm products are perishable and cannot be stored indefinitely. Therefore, farmers must sell their production within a relatively short period of time, regardless of market prices.

— Capital invested in agricultural production cannot easily be transferred. This is true for crops, as well as livestock and dairy production.

— Farmers marketing their products individually lack bargaining power in the marketplace. There are relatively few buyers who process and distribute raw agricultural commodities. Section 2 of the Act grants specific authority to the Secretary of Agriculture to guard against possible abuses of Capper-Volstead by requiring the issuance of a complaint if the Secretary has reason to believe that any association monopolizes or restrains trade to such an extent that the price of any agricultural product is unduly enhanced. The Secretary is authorized to issue a cease and desist order against the association.

Since the enactment of Capper-Volstead, the Secretary of Agriculture has investigated a number of undue price enhancement charges against cooperatives. The most recent investigation occurred in the 1970's and involved alleged overpricing of milk. After thorough investigation and study of the entire dairy industry by various agencies within USDA, it was concluded that no undue price enhancement had occurred.

It is important to remember that this scrutiny of cooperatives is not confined to the Secretary but is also shared by the Department of Justice. Capper-Volstead grants only limited antitrust immunity. Once a cooperative is formed, it is limited in its business activities in much the same way as non-cooperatives. For example, the courts have held that:

1. Capper-Volstead exemption may be lost if a cooperative includes persons who are not agricultural producers.
2. Cooperatives that combine or conspire with non-cooperatives or persons other than producers to monopolize or restrain trade are subject to the antitrust laws.
3. Cooperatives that engage in predatory conduct in order to restrain trade or monopolize or attempt to monopolize are subject to action under sections 1 and 2 of the Sherman Act even though price is not unduly enhanced.
4. Cooperatives cannot control the resale prices of customers.

Clearly, these limitations indicate that effective enforcement of the antitrust laws as they apply to agricultural cooperatives is being carried out by the Courts, the Department of Agriculture and the Justice Department. An additional layer of FTC or other regulation is simply unnecessary and burdensome.

MARKETING ORDERS

The Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. Sec. 601 et.seq. authorizes the Secretary of Agriculture to enter into marketing agreements with handlers or to issue marketing orders regulating the handling of milk and other agricultural commodities in interstate commerce. The objective of the statute is to effect an or-

derly flow of commodities in order to protect the interests of consumers as well as farmers under the direct regulatory control of the Secretary of Agriculture.

Marketing orders relating to milk provide a regulatory mechanism for defining a regulated marketing area, for classifying milk in accordance with its end use, and for establishing minimum prices which each handler must pay for each "use classification" disposed of in the regulated area.

Marketing orders relating to commodities other than milk (fruits and vegetables, principally) do not establish minimum prices, but provide a regulatory mechanism which may:

(a) govern the rate of flow of the regulated commodity to market;

(b) create reserve pools to manage and equitably apportion surplus among producers and handlers;

(c) control the grade, size and quality of the commodity that may be marketed;

(d) allot to handlers the amount of each grade, size or quality of a commodity which each handler may purchase from or handle on behalf of producers;

(e) allot to handlers a "marketing quota" based on the amount of the commodity marketed by the handler during a specified period;

(f) provide a system for inspecting commodities and establishing standards of size, weight and pack;

(g) provide for research and development to improve or promote the marketing, distribution and consumption of the commodity.

Section 8b of the Act provides that marketing agreements entered into between the Secretary of Agriculture and handlers (or orders issued by the Secretary) are exempt from the antitrust laws. This exemption is based in large part on recognition of the Secretary's responsibility for balancing the public interest among producers, handlers, and consumers. Changes in marketing orders are made on the record following full notice to interested parties and the opportunity to be heard. The Food Security Act of 1985 and the Food Security Improvements Act of 1986 both contain changes designed to improve the operation of the milk order program.

COOPERATIVES AND THE FEDERAL TRADE COMMISSION

Cooperatives sought restrictions on the use of funds in the FTC Improvements Act of 1980 because during the early 1970's the Commission ignored the provisions of the Capper-Volstead Act and the Agricultural Marketing Agreement Act by proceeding against cooperatives and marketing orders. The costs to cooperatives, and indeed to the government, as a result of these intrusions into the jurisdiction of the Secretary of Agriculture were substantial.

In the mid-1970's, as part of a study into the role of agriculture cooperatives in the economy, the Commission requested vast amounts of information from the 60 largest cooperatives. One request was so broad that 81 pages of index were required to list all the materials supplied by the single cooperative. A 17-page subpoena was served on a Northeast dairy cooperative which was required to spend nearly 50,000 man-hours at 42 separate locations in order to collect the 29,000 documents requested.

During this same period the FTC instituted an investigation of Ocean Spray Cranberries, Inc. which dragged on for nearly 10 years at substantial cost to the cooperative and its members. No complaint was ever issued and the matter was finally closed.

In 1974 the Commission issued a complaint against the Central California Lettuce Producers Cooperative charging price fixing, which in turn spawned private litigation against the cooperative in federal district court. The administrative action was argued twice before the Commission and was finally dismissed, but only after the district court ruled that the challenged activities were within the scope of the Capper-Volstead Act. More than a quarter of a million dollars was spent to defend the lettuce case.

Shortly afterward the Commission challenged Sunkist Growers, Inc., a citrus marketing cooperative comprised of 6,500 growers. The complaint against Sunkist included a number of allegations, but the real objective was to attack the cooperative's share of the market. Since Capper-Volstead was intended to help farmers increase their market share, the Sunkist case put the FTC on a true collision course with Capper-Volstead. Sunkist attempted to challenge the Commission's asserted jurisdiction in the courts. However, after being faced with legal expenses amounting to nearly $1 million per

year, Sunkist was forced to enter into a consent decree to avoid additional costs that would otherwise have been borne directly by Sunkist's member growers.

Each of the cooperatives mentioned in the examples is organized and operated in accordance with the requirements of the Capper-Volstead Act. Yet to our knowledge the Commission never inquired of the Secretary of Agriculture or even made a specific ruling as to whether the Capper-Volstead Act provided immunity prior to initiating the studies or issuing the complaints.

These activities provided the backdrop for the efforts by cooperatives to convince Congress to restrain the FTC from interfering with the rights conferred by Capper-Volstead and with marketing orders and culminated in passage of the FTC Improvements Act of 1980.

The Conference Report accompanying the Improvements Act stated the conferees' desire to ratify the spirit and intent of the Capper-Volstead Act, and their belief that the rationale for the limited antitrust exemption contained in the statute is valid. The Conference Report clearly indicates that the protections afforded cooperatives by the Capper-Volstead are legitimate and necessary, and that the FTC should not impose additional layers of authority in an area where the Secretary of Agriculture and the Department of Justice already have primary jurisdiction to prohibit illegal conduct.

LEGISLATIVE HISTORY

Capper-Volstead is remedial legislation designed to protect farmers who choose to market their crops through cooperative associations from being prosecuted for conduct that would otherwise be regarded as a violation of the antitrust laws. The legislative history brings into sharp focus the fact that Congress specifically considered the question of whether to place Section 2 authority with the Secretary of Agriculture or in the Federal Trade Commission. When the measure which passed the House of Representatives reached the Senate floor, an attempt was made to substitute the words "Federal Trade Commission" for the words "Secretary of Agriculture," and the floor debates contain pointed arguments in support of both versions. When the vote was taken, the Senate affirmed the House version and refused to place the authority in the FTC.

Because Capper-Volstead was remedial legislation its purpose was to grant antitrust relief to farmers who were threatened with antitrust prosecutions. Congress was not seeking to add a third government agency to supplement existing authority of the Department of Justice and the FTC. Instead it was seeking to immunize and protect farmers from antitrust prosecution for conduct falling within the scope of Capper-Volstead. It deliberately chose the Department of Agriculture to guard against abuse of the exemption, not the FTC.

The FTC Improvements Act reaffirmed this Congressional intent and clearly limited the role of the Commission with regard to agricultural cooperatives. Without this provision, cooperatives have little if any protection from FTC harassment if the Commission decides to proceed without a meaningful determination as to whether Capper-Volstead affords immunity. For this reason the National Council supports adoption of permanent language in the Federal Trade Commission Act that would prevent the Commission from studying, investigating or prosecuting any agricultural cooperative for acts or transactions that fall within the scope of the Capper-Volstead Act.

We also urge you to retain the prohibitions against FTC study or investigation of marketing orders. FTC involvement in this area would be duplicative and costly. Responsibility for oversight and enforcement of marketing orders rests with the Secretary of Agriculture under the provisions of the Agricultural Marketing Agreement Act of 1937.

The Department of Agriculture has the necessary expertise and trained personnel to monitor and enforce these marketing order programs. There is no need for the FTC to expend funds to duplicate these efforts. In addition, the House and Senate Agriculture Committees regularly review the marketing order program as part of their oversight responsibilities.

CONCLUSION

Mr. Chairman, the exemptions from antitrust laws given to farmers and their coopera-

tives are limited, carefully drawn exemptions regulated by the Secretary of Agriculture, and narrowly construed by the courts to achieve only their intended purposes. Looking at the experience since passage of the Improvements Act, the Secretary of Agriculture has continued to effectively regulate both the Capper-Volstead Act and marketing orders. During that time, consumer prices have not been unduly affected.

Cooperatives help bridge the gap between the farm gate and the consumer's table. They bring efficiency to the system, and they force others in the system to be efficient in order to compete. In this way they serve both the producer and consumer well.

The FTC has no compelling reasons to try to impose itself in an area which is already extensively regulated. The public is protected under present law. The protection is balanced. The only result would be to weaken cooperatives to the detriment of farmers as well as consumers.

Senator GORE. Thank you. Thank you very much. We appreciate that statement.

Mr. Donald Randall, welcome.

STATEMENT OF DONALD A. RANDALL, EXECUTIVE PRESIDENT AND GENERAL COUNSEL, NATIONAL INDEPENDENT DAIRY-FOODS ASSOCIATION; ACCOMPANIED BY HARRY G. SHUPE, COUNSEL

Mr. RANDALL. Senator Gore, I would like to introduce my counsel, Mr. Harry G. Shupe, on my left here.

Senator GORE. Welcome.

Mr. RANDALL. The National Independent Dairy-Foods Association, NIDA, has a nationwide membership of independent proprietary dairy processors, manufacturers, and distributors. NIDA's members are concerned about the future role of the Federal Trade Commission in helping to preserve competition in agriculture and the dairy industry.

There appears to be an accelerating merger trend in the dairy industry, and a large part of this merger movement is the consolidations and acquisitions among the large producer cooperatives.

The following has been excerpted from a recent industry publication:

The combined boards of Associated Milk Producers, Inc., Mid-American Dairymen, Inc., and Mountain Empire Dairymen's Association will meet in St. Louis September 18-19 to review a USDA study on possible two-way and three-way mergers involving these cooperatives.

AMPI counts some 22,000 members, while MID-AM membership totals 11,000.

... Putting these three major cooperatives into a merged organization would unite producers from Texas to the Canadian border, from Colorado to Indiana—nearly 40,000 producers in one organization.

Each time one of these giants takes over a smaller organization, there is a loss of competition at the producer level. More damaging effects of these mergers result to the independent proprietary handlers. Handlers end up losing alternative supplies of milk and a single cooperative gains a producer monopoly. Usually that monopolist is not only the handler's supplier, it is the major competitor of the handler in processing, manufacturing, and distributing.

Agricultural cooperatives are big business. Marketing volume of 46 billion in 1985 and the dairy cooperatives were the leading commodity at 15.4 billion. Regional giant dairy cooperatives rank well up on the Fortune 500. AMPI, for instance, in 1985 had annual sales of $2.4 bil-

lion. Mid-American, approximately $1.3 to $1.5 billion. Dairymen, Incorporated, from $1 to $1.3 billion in annual sales.

The dim future for independent competition in the dairy industry can be brightened considerably by eliminating unnecessary restrictions in the FTC's authorization concerning agriculture such as Section 24 in S. 1078 in the 99th Congress.

There is absolutely no evidence that the FTC acted beyond the scope of its authority in any antitrust matter involving agriculture. It would be a highly beneficial service to Congress, the Secretary of Agriculture, and the public for the FTC to be free to study and issue written reports on the effects of certain market orders when this seems appropriate.

The complicated and burdensome language of 1078, Section 24(1) through (8) requiring prior consultation by the Commission with the Secretary of Agriculture before issuing a complaint involving an agricultural cooperative has no place in an authorization of the Federal Trade Commission. The Secretary of Agriculture has no expertise in trade restraint or antitrust, nor has he ever exercised any actions in those areas under his authority under Section 2.

The entire Section 24 of 1078 would spawn horrendous amounts of litigation designed to delay and frustrate any FTC action, as we pointed out in our letter to the Committee staff in 1985. There are several questions that are raised:

The Secretary of Agriculture has no expertise in trade restraints or antitrust. He has no initiative nor experienced personnel to review, consider, or consult on such matters with the FTC. The Secretary has never exercised his authority under Section 2 except to conduct a brief investigation which whitewashed the complaints that were filed--although, during the 60 years involved he has been presented with the same factual cases and evidence that were subsequently prosecuted to a completion by the Department of Justice.

What procedures would satisfy the requirements that the Commission consult with the Secretary of Agriculture regarding the possible applicability of the Capper-Volstead Act to the conduct of the cooperative? And will this consultation be open to challenge for insufficiency? What amount of consideration must the FTC give to the Secretary's comments? What weight will be given to his comments in any jurisdictional challenged based on the lack of consideration?

Shall the FTC make a formal finding that the Capper-Volstead Act does not apply, and that there is a complete exemption? Is that in conflict with the FTC's authority to proceed? If the FTC modifies a complaint after it has been provided to the Secretary of Agriculture and it determines that the modification is substantial and it does not provide modified complaints to the Secretary, is the determination of insubstantiability subject to challenge and review?

NIDA continues to maintain that the same questions and objectives would be relevant to any section (c) as is provided for in 1078.

We thank you for the opportunity to be here. I wanted to also commend your staff for such a balanced program of witnesses on all the important issues coming before you.

[The statement follows:]

STATEMENT OF DONALD A. RANDALL, EXECUTIVE VICE PRESIDENT, NATIONAL INDEPENDENT DAIRY-FOODS ASSOCIATION

The National Independent Dairy-Foods Association (NIDA) has a nationwide membership of independent proprietary dairy processors, manufacturers and distributors of fluid milk and a complete variety of cheese and dairy products. NIDA's members are known in the dairy industry as handlers. NIDA has no dairy cooperatives as members, but the association indirectly represents the views of thousands of independent dairy farmers. Our members market the milk of these producers and provide them with various market services.

On behalf of NIDA's members, I thank the Subcommittee for the opportunity to appear and present our concerns about the future role of the Federal Trade Commission in helping to preserve competition in agriculture and the dairy industry.

It may seem to some Members of Congress that competition and domestic agricultural marketing are opposites, or as we used to say, with the exception of salad dressings, like oil and water, they don't mix. The mistaken view of many has been that agricultural producers are too small, too independent or fragmented to face free competitive markets. This has historically brought forth huge subsidies, mountains of regulations and antitrust exemptions, all in the charade of saving the family farmer. Ironically, the family father hasn't been saved, only the large corporate farmer and the giant corporate cooperatives have grown and prospered.

The competitive marketplace in agriculture has steadily deteriorated and Congress has unwittingly played a large role. Congress has mistakenly passed laws which have subsidized the large corporate farmers and cooperatives, and substantially increased the market power of these organizations. This has been done under the appearance of helping the small family farmers by assisting them to act collectively to combat the power of the large food processor corporations. The realities are that individual, moderate-sized farms, whether they are partnerships or family corporations, have been losing their right to remain independent and to select their markets to maximize their selling prices. These policies have been damaging to both the independent handler and the independent farmer. Also, we have removed substantially the discipline of antitrust from the dairy industry and the resulting danger signals are everywhere.

The tremendous loss of independent proprietary handlers in the nation's dairy industry over the past thirty years has been discussed and documented, but no meaningful studies we know of have really focused on the effects of the powerful, regional, fully-integrated dairy cooperatives. These cooperatives control vast supplies of fluid milk and directly compete against independent processors in wholesale markets.

We know, for example, that in a 1976 study (Public Policy Toward Mergers in the Dairy Processing Industry; Mueller, Hamm & Cook; N.C. Project 117, Monograph 3) the number of fluid processors were shown to have declined from 8,185 in 1950 to 1,619 in 1974, by 80%. The same study concluded, "...that fewer than 500 fluid milk processors will survive as viable competitors over the next decade." (P. 93) We estimate that only a few hundred or less remain in business with concentration in the hands of regional dairy cooperatives, national companies, chain stores, and moderately-sized regional companies.

MERGERS AND RESTRAINTS OF TRADE IN THE DAIRY INDUSTRY

There appears to be an accelerating merger trend in the dairy industry and a large part of this merger movement is the consolidations and acquisitions among the large producer cooperatives. The FTC and the Department of Justice seem to stand by and wring their hands or look the other way. The Secretary of Agriculture has substantial authority under Section 2 of the Capper-Volstead Act, but he has not, and will not use it! In fact, to the contrary, the Department of Agriculture provides the feasibility studies and data on which these mergers are planned.

The following has been excerpted from a recent industry publication:

"Three Co-op Boards to Review USDA Merger Study

"The combined boards of Associated Milk Producers, Inc., Mid-America Dairymen, Inc. and Mountain Empire Dairymen's Assn. will meet in St. Louis, September 18-19, to review a USDA study on possible two-way and three way mergers involving those cooperatives.

"Merger is a burgeoning mania in the U.S. dairy industry at all sectors.

"With events moving quickly, a big dairy co-op merger could take place by Jan. 1, 1987. If not by then, within six monrhs.

"AMPI counts some 22,000 members, while Mid-Am membership totals about 11,000.

"It is very possible that the structure of the dairy industry could look noticeably different, come January 1. Putting these three major cooperatives into a merged organization would unite producers from Texas to the Canadian border, from Colorado to Indiana nearly 40,000 producers in one organization."

The Milkweed, Issue No. 87, August 1986.

The same publication details the acquisition of Falls Dairy by AMPI and the merger between AMPI and Morning Glory Farms, one of the largest Wisconsin dairy cooperatives.

Each time one of the giants takes over a smaller organization, there is a loss of competition at the producer level, and also a loss of competition among their processing and manufacturing plants. This shrinks the options of cooperative members to alternatively market their milk, but also, and more significantly, it reduces the options of the nonmember, independent dairy farmer. It forecloses market outlets to them. New enrrants into dairy production find fewer alternatives. It is an established fact in the dairy industry that where there are two or more dairy cooperatives, plus proprietary plants, there is competition for the farmers' milk, and this means higher farm milk prices. This is the current situation in some parts of the country.

The more damaging effects of these mergers result to independent proprietary handlers. Handlers end up losing alternative supplies of milk, and a single cooperative gains a producer monopoly. Usually, that monopolist is not only the handler's supplier, it is the major competitor of the handler in processing, manufacturing and distribution. It doesn't take expertise in the dairy industry to understand the problems faced by a small businessman who musr purchase 100% of his raw material from a cooperative who is also his largest competitor in his finished producr marker.

The FTC understands these problems. All independent companies in our industry face the future without the protection of some of the restrictions in the antitrust consent decrees against AMPI, Mid-America, and Agri-Mark—the largest dairy cooperative in the Northeast. These restrictions, which prevented acquisitions and mergers by these cooperatives without prior approval of the Department of Justice, were placed in the court-approved settlement agreements of their antitrust violations. The written expiration dates on these restrictions have now passed.

Not only future mergers and acquisitions may threaten handlers and producers, but also, the predatory actions that were taken by large cooperatives against their competitors are still possible. We need only to refer to the opinion of the Eighth U.S. Court of Appeals in Alexander *v.* National Farmers Organization 687 F2d 1173 (8th Cir. 1982):

"... Capper-Volstead cooperatives may agree to eliminate competition between themselves and to pursue monopoly power through lawful means. The prohibited aim is to pursue such power or seek to eliminate competition through predatory, anticompeitive or other unlawful tactics.

AMPI, Mid-Am and CMPC did conspire to monopolize and eliminate competition in the marketing of Grade A milk produced in the Midwest, through the use of discriminatory pricing, coercive supply disruptions and threats of similar conduct, as well as bad faith harassment and threats of litigation against independent buyers of NFO milk."

AMPI officials were involved in the destruction of documents. The court said, "We can only describe AMPI's conduct as outrageous."

We have no way of knowing whether or not the FTC would ever find probable cause to examine and act on any future mergers, particularly acquisitions of noncooperative entities by agricultural cooperatives. Its hands must be untied so that it can carry out its limited, but effective role in agricultural antitrust.

CONCLUSION: FREE THE FTC FROM UNNECESSARY RESTRAINTS

The dim future for independent competition in the dairy industry can be brightened considerably by eliminating any unnecessary restrictions in FTC authorization concerning agriculture. It should have authority to study and advise Congress, or the Attorney General, and in appropriate cases, ro advise and assist the Secretary of Agriculture. The Commission must not be "hand-tied" by the pointless amendment that appeared as proposed Section 24 of the Federal Trade Commission Act in S. 1078. (May 6, 1985; Rep. 99-81, June 11, 1985, pp. 30-31) Of course, part of the language within that proposed section was carried over from prior years' appropriations bills. These restrictions were unwisely added to satisfy the demands of certain agricultural cooperatives with substantial PAC's.

The restrictive language of proposed Sections 24(b) and (d) in 1985's S. 1078 have never received any full hearing in either the Senate or the House. This language may have been added in a spite attack on the FTC during its weak period when it was out of favor with the Congress and a variety of businesses. It served no purpose to recite that:

"(b) The Commission shall nor have any authority to conduct any study, investigation, or prosecution of any agricultural cooperative for any conduct which, because of the provisions of rhe Capper-Volstead Act, is not a violation of any of the antitrust Acts or this Act." [1]

This merely restated the existing status of the law in 1980 concerning FTC's jurisdiction in agriculture.

There is absolutely no evidence that the FTC acred beyond the scope of its authority in any antitrust matter involving agriculture. Where the Congress, through the Capper-Volstead Act, has granted limited immunity to the conduct of agricultural cooperatives, the FTC has prudently found no jurisdiction. The FTC has acted with constraint and moderarion. In two matters, FTC *v.* Dairymen, Inc. (Dkt. 9143) and FTC *v.* Sunkist (Dkt. 9100), one of which was decided favorably for the cooperative, those respondents attempted to litigate the jurisdiction of the FTC, administratively and through the courts, before any complaint could issue. This is an often used, but costly strategy of respondents or defendants in cases where possible immunity from prosecution is involved. The FTC now has, and has always possessed jurisdiction over the nonexempt actions and conduct of agricultural cooperatives. Of course, the Commission has, and always will, make the threshhold determination of its jurisdiction and appropriately consider any immunity statutes such as Capper-Volstead. It is totally inappropriate to provide for threshhold litigation of FTC's jurisdiction. In the Dairymen, Inc. case, the respondent made its own decision to pursue the expensive and questionable tactic of challenging FTC jurisdiction. The case was later dismissed by the Commission without a full hearing, and no further action was taken.

The restriction on the FTC from using any funds for the purpose of conducting any study or investigation of any agricultural marketing order was probably motivated by the unofficial 1975 FTC staff study by a group of attorneys and economists in the FTC'S Bureau of Competition. The study was informative. This restriction on studies is a disservice to the Congress and the American people. It has no jusrifiable place in the FTC appropriation. We frequently hear from members of Congress that they don't understand agricultural marketing orders. Every few years, when Congress is debating the dairy provisions of an omnibus agriculture bill, we hear the same complaints from Members of Congress' staffs. "Please don't prepare papers on, or try to discuss the federal milk marketing order system, it is just too complicated and we don't have time to understand it?" On the other hand, some Members of Congress, people in the dairy industry, and consumer organizarions ask another question, "Why do we always have to defer to the Secretary of Agriculture on any issue concerning rhe effects of Federal Marketing Orders? The Secretary of Agriculture has an institutional bias as the chief official who writes them, issues them, promotes them, and presides over a bureaucracy which enforces them."

The Attorney General intervenes in market order proceedings with briefs and findings when significant anticompetitive results will occur. We believe that it would be a highly beneficial service to Congress, the Secretary of Agriculture, and the public for the FTC to be free to study and issue written reports on the effects of certain market orders, when and where this is appropriate.

The complicated and burdensome language in S. 1078 Sec. 24(c)(1)-(8) requiring prior consultation by the Commission with the Secretary of Agriculture before issuing a complaint involving an agricultural cooperative, has no place in an aurhorizarion of the Federal Trade Commission. This entire section would spawn horrendous amounts of litigation designed ro delay and frustrare any FTC action as we pointed out in our 1985 letter to the Committee staff. It raises several questions:

"4) The Secretary of Agriculture has no expertise in trade restraints or antitrust. He has no initiative nor experienced personnel to review, consider, or consult on such matters wirh the FTC. The Secretary of Agriculture has never exercised his authority under Section 2 of the Capper-Volstead Act, although he has been presented with the same factual cases prosecured by the Justice Department and which have resulted in antitrust orders against cooperatives during the past sixty years.

"a) What procedure would satisfy the requirement that the Commission "consult with the Secretary of Agriculture regarding the possible applicability of the Capper-Volstead Act to the conduct of the cooperative," and will this consultation be open to challenge for insufficiency?

"b) What amount of consideration must the FTC give to the Secretary's comments, and what weight will be given to his comments in any jurisdictional challenge based on lack of consideration?

"c) Shall the FTC make a formal finding that the Capper-Volstead Act does not provide an exemption for the cooperative's conduct; must it hold a jurisdiction hearing; and/or must it make any jurisdictional precomplaint, proceedings public or rhe record thereof, public?

"d) If the FTC modifies a complaint after it has been provided to the Secretary of Agriculture and it determines that the modification is not substantial, and it does not provide the modified complaint to the Secretary, is thar determination of insubstantiality subject to challenge and review?"

NIDA continues to maintain that the same questions and objections would make subsection (c) of Section 24 of S. 1078 an extremely bad amendment.

Again, let me thank you for your invitation to appear. We hope the points we have raised will give the Subcommittee good reason for rejecting any amendments similar to Section 24 of S. 1078.

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[1] Section 20 of Pub. L. 96-252, prohibited the Federal Trade Commission from using any funds authorized to be appropriated to carry out this chapter (FTC Act) for fiscal year 1980, 1981, or 1982 for the purpose of conducting any study, investigation, or prosecution of any agricultural cooperative for any conduct which, because of section 291 et seq., of Title 7, Agriculture, is not a violation of any Federal antitrust act or this chapter (FTC Act), or for the purpose of conducting any study or investigation of any agriculrural marketing orders, and was extended by Pub. L. 97-377, Title I, §101(d), Dec. 21, 1981, 96 Stat. 1870, until the termination date set forth in section 102(c) of H.R. Res. 631 [Sept. 30, 1983], as enacted into law, notwithstanding Pub. L. 96-252, §§10(e), 21(i).

Senator GORE. Well, your comment is much appreciated, and we thank you for your testimony.

Let me ask you a question that you have already addressed in part in your statement, but if I could get a short answer for the record: The Capper-Volstead Act provided that agricultural producers may act together in various aspects of industry activity, and the Act further authorized the Secretary of Agriculture to guard against abuses in restraint of trade under that provision through the use of cease and desist orders and other enforcement weapons.

Why is that explicit authority not sufficient to guard against the concerns you have raised?

Mr. RANDALL. Well, two reasons, Mr. Chairman.

First, the Secretary is charged with the obligation of promoting this industry, promoting the market orders, encouraging the cooperatives, and in every respect to act favorably in their behalf.

While he has a public interest obligation under the law, that public interest has never been defined, and he is not now required to meet a statutory definition of what the public interest is.

Secondly, it has to do with price enhancement only, and not to the predatory behavior that the large cooperatives have so frequently engaged in in the past for which they have been prosecuted on several occasions.

Senator GORE. Would you like to comment on this response, Mr. Wagner?

Mr. WAGNER. Well, I would indicate as to the latter part that when predatory actions occur, the Department of Justice has taken action. We have several leading cases in which they resolved that issue, and I think that is the proper agency to handle what we would consider predatory acts.

As far as the Secretary of Agriculture and his function, he has many functions. Under the Agricultural Fair Practices Act, he has also been careful to take care of what would be considered a noncooperative member in his programs. And there are extensive review provisions in the Marketing Agreement Act providing that you go through the judicial officer and the court.

So I would argue that the Secretary has full regulatory powers. I might mention the fact that yesterday you heard that the Federal Credit Union should be taken out from FTC because they are fully handled somewhere else. I think the agricultural cooperatives make a case in the same way under the Secretary of Agriculture.

Senator GORE. Now how do you respond, Mr. Wagner, to criticism that the limitations on the FTC's ability to investigate or study co-ops, agricultural co-ops, amounts to a benefit which redounds predominantly to the benefit of large corporate farmers at the expense of family farmers?

Mr. WAGNER. Oh, I do not think that the study issue zeroes in on that at all. I think the study——

Senator GORE. You have heard such criticism, have you not?

Mr. WAGNER. I have heard the criticism that they want to study. We have all kinds of studies. We are answering questionnaires from the Land Grant Colleges, from the think tanks; in our case, we have had the Department of Justice, the Federal Trade Commission, we have had five major studies since 1980 on agricultural co-ops, and I do not think there is any lack of studies. There are more of them than you can read.

Senator GORE. Do you want to respond to that question, Mr. Randall?

Mr. RANDALL. Well, I would like to say first that the mergers that have taken place within the large dairy cooperatives are presenting us now with multibillion dollar corporations that are fully integrated, not just the farmer, not just the small farmer, but tens of thousands of large farmers who are in fact receiving the bulk of the benefits of the subsidy programs. Seventy-five percent of the USDA benefit programs go to 25 percent of the dairy farmers.

This merger movement is serious in the sense that, since 1970, the proprietary dairies have declined from about 8,100 to something less than 500 in this country today. We have lost a great deal of the flexibility of the local dairy and the regional dairy being able to supply that local market.

We seriously question whether or not giant cooperatives who make very bad business judgments in overbuilding plants and spend $8 million or more to build a plant in Savannah that has to now be bailed out by the producers that are in their cooperative, that kind of behavior we think needs to be looked at. The efficiency and relative inefficiency of the system of delivery of the Nation's milk through these cooperatives needs to be studied, and the public will be the beneficiary.

New York is just a perfect example of where an artificial control of our market, artificially stimulated high prices, and that was broken when competition was permitted to come in.

Senator GORE. Well, thank you. My time is up.

Senator McCain.

Senator MCCAIN. Thank you, Mr. Chairman, and I thank the panelists for being here.

I do not claim to be an expert on these issues, Mr. Randall, and I do not quite understand; in your testimony you point out that there is an ongoing tragedy taking place across America, and that is the decrease in the numbers of dairy farmers, but I think that is happening in every line of agriculture. Is that not true?

Yet, you seem to make a case that it is because of lack of supervision by the FTC that this is taking place. But it is happening across agriculture across this country. In other words, are there not many other factors that are contributing to the decline in numbers and the mergers, as you describe them, besides a lack of jurisdictional oversight?

Mr. RANDALL. I would have to agree as to that question, but it is a little bit loaded, Senator, in the sense that there are a multitude of factors affecting the American farmers. We believe that misguided Federal policy increasing the bureaucratic regulation over our agriculture is in itself a demonstrated evil that has brought about the decline in the small farmers in the United States.

We have been doing something wrong for 40 years, and we seem to keep on doing it. Where competition is permitted to flourish, whether it be in dairy or in other commodities, we know that there is a fallout of efficiency and benefit that the consumer experiences, and we think that would be a more appropriate route to go. At least let us let an agency that has the economic staff and capability take a look at it and give the Congress some recommendations. Why hide it under a cloak of secrecy that is added to that secrecy that is maintained by USDA over the cooperatives' activities?

We have great trouble finding out what they are doing and making judgments about it, and I think the Congress has that same difficulty.

Senator MCCAIN. Well, I do not disagree with anything you said, except for the fact that it seems to me that one of the primary reasons for the disappearance for the family farmer, as we call him, is his inability

to compete across the board with the very large farms that are able, with less labor and with more efficiency and more capital investment, to basically drive the small family farmer off the playing field.

Mr. RANDALL. If they were all playing on a level field with all playing by the same rules. But where you have an imbalance, and where you have artificial constraints and inducements that disproportionately favor the larger farmer over the small farmer, as we now have through our agricultural commodity programs, then I think you will have the results you just described.

Senator MCCAIN. I guess my point is that I think we might have this tragedy anyway. But let me go on.

You stated that the USDA encourages and acts favorably towards the marketing order concept. It seems to me I remember a couple of years ago the marketing orders themselves were under strong attack from the Secretary of Agriculture and they had some difficulties in preserving them. Is that right, Mr. Wagner?

Mr. WAGNER. I think Mr. Quarles could comment on that. We have had various different policies, and those of us in the order program of course have thought that they helped mitigate some of these problems that you have discussed. I think you have the correct picture.

Senator GORE. Mr. Quarles?

Mr. QUARLES. Yes. I would say that since 1980 there has been a considerable review and study of agricultural marketing orders by USDA. As a matter of fact, we are aware of at least five major studies that have been published by USDA during that period of time.

For us, it was rather remarkable when Chairman Oliver mentioned yesterday that the FTC could provide some additional help and support to the Department of Agriculture in this area through their study and investigation of these programs, in light of the fact that the economic research service of USDA alone has over 500 economists whose sole purpose is to——

Senator MCCAIN. Perhaps that is the problem.

Mr. QUARLES. It may be. But if I could comment a little further, Senator, the legislative history of the Capper-Volstead Act makes it quite clear that the Congress considered whether or not to grant jurisdiction to the FTC as opposed to the Secretary of Agriculture over the lengthy legislative process.

The decision was made by the Congress to grant that jurisdiction to the Secretary of Agriculture. Now the FTC, to be granted further authority in this area, would simply be duplicative and, if one takes a look at what the FTC is asking here, they are asking for the authority to review the activities of the Secretary of Agriculture. That in itself seems extremely remarkable.

With regard to the Chairman's efforts to move ahead on reauthorization, it would seem to us that this is one area where the conference committee did agree last year on language, and we would hope that this matter is settled.

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Senator McCain. Thank you, Mr. Chairman.

You know, Mr. Chairman, I think one of the aspects that we ought to look at as we address this question is a point that was raised yesterday. The FTC has experienced, according to Commissioner. Bailey, a 30 percent decrease in their budget, and I wonder where we stop expanding the authority of the FTC and either look at expanding their budget along with that, or look at whether they are capable of performing the duties which they are already assigned, since a previous witness alledged that perhaps they are not.

Senator Gore. I think that is an excellent point. As we get into this more deeply, one of the things that I believe will become apparent is they need more help in these regional offices, and they need to bring them up to full operating strength.

But, yes, I think that is a good point.

Senator Breaux.

Senator Breaux. Thank you very much, Mr. Chairman. I thank the panel for their presentations.

Mr. Wagner, some would argue that conditions are vastly different in the industry than they were back in the 1920s when Capper-Volstead was passed; that at that time we were talking about mainly small, individual dairymen. We are talking about dairymen who operated without the benefit of any kind of government program or government help and assistance.

Mr. Randall has pointed out this morning some of those differences. When he talks about some of the mergers that are being considered and talked about in the dairy industry, talking about mergers that would put as many as 40,000 producers together in one single organization which would be covering the area from the Canadian border, from Colorado, Texas, basically the majority part of the entire United States, and that conditions are really different now; that the reason for Capper-Volstead, to help the small dairymen, no longer exists, and that they should be subject to the same type of inquiries as any other large business in the United States.

How do you respond to that?

Mr. Wagner. I do not think that the relevance of Capper-Volstead has changed. As we know, the number of outlets that a dairy farmer has, his customers, or his handler, or dealer, has gone down from probably 30,000 at that time to under 3,000 now.

Senator Breaux. But you are more efficient and you are producing more milk than you were back then.

Mr. Wagner. Well, I am talking now about the customers. As far as the dairy farmers, we are down to probably under 200,000, where we at one time had 2 million.

Senator Breaux. But what is your production?

Mr. Wagner. And the production is larger than it has ever been, and this trend is going to continue. We are going to have a shift probably to greater production on the West Coast where we now have the lowest cost of production.

Senator BREAUX. Well, that is the point. How do you answer the point that you have fewer producers producing more milk, which means they are larger, and therefore the reasons for Capper-Volstead of protecting the small, individual producer in 1922 no longer exists in 1987?

Mr. WAGNER. Well, what I would point out is that some 150to 200,000 farmers producing milk are still an important factor, and they need, because they are independent businessmen, the protection of Capper-Volstead. My statement makes clear that the actions that are challenged have been handled in the courts, and they have been handled in other litigation.

Senator BREAUX. In your testimony, you talk about the Secretary of Agriculture investigating the industry. You said, "The most recent investigation occurred in the 1970's". You have had an explosion of growth between 1970 and 1987 in size, in fewer members, and that does not sound like a very aggressive attitude on the part of the Department of Agriculture, in looking at this, if the last investigation was conducted back in the 1970s.

Mr. WAGNER. There was an extensive investigation by the Secretary for the year 1975. He conducted it in 1976 and concluded what you would expect on an agricultural commodity. That is, there is a cycle, and there are correcting influences at work all the time. If 150,000 farmers produced more, instead of 2 million, you would still have the same economic effect.

I do not think just because we have fewer farmers who are now more efficiently producing food at a cheaper price for everyone that they should have to undergo a lifting of Capper-Volstead.

Senator BREAUX. Well, the argument would be the reason is because fewer farmers have the ability to band together and fix prices without the competition. You have fewer numbers out there in the market.

Mr. WAGNER. Well, the limitations I think are self-correcting in the fact that as more product is produced, the economic forces take over, just as they do on the competitive side in the distribution of milk.

Senator BREAUX. Mr. Randall, your people benefit from everything that Mr. Wagner's group is doing, do you not?

Mr. RANDALL. Well, not always. When they charge us over-order premiums, for instance, those are prices over the Federal order prices. They use the money that we pay them in those over-order premium prices to come in and compete with us with our own customers. So that becomes a real problem for us as a handler.

I would like to make two quick points, if I may, in reference to your questions. First of all, Secretary Block in 1980 stated to this Committee that he was going to establish an office of Undue Price Enhancement, and he was going to appoint someone to run that office within USDA. It has, to my knowledge, never been done.

Secondly, I would call the Committee's attention to the fact that this restriction on the FTC was adopted without one day of hearings from the industry or witnesses, not one word in public was taken before that restriction was adopted.

And as to the budget, I think the Chairman yesterday very well answered it. The allocation of his resources, based on the priorities of the public good to be achieved, would be something that the Commission should be determining, rather than the Committee, if I may suggest that.

Senator GORE. We will have a second round, if anybody wants it. Go right ahead.

Senator BREAUX. I just had one other question.

What would you have this Committee do to Capper-Volstead? What would you like them to be doing that they cannot do now because of Capper-Volstead?

Mr. RANDALL. Well frankly, Senator Breaux, the Judiciary Committee I believe would be the committee that would have to act.

Senator BREAUX. All right, what would you like the Congress to do with Capper-Volstead?

Mr. RANDALL. We think that Capper-Volstead is long overdue a review, and we need to have more information about what is going on in the marketplace. I think the Federal Trade Commission in about 12 months ought to be called upon to produce a report that would enlighten the Congress on the appropriateness of keeping Capper-Volstead as it is currently in the la .

I would concede to you that there probably is a need for some kind of ability of the smaller farmers on the farm to unite and to produce at the farm level. However, I would strongly suggest that once they get past the farm and get into production and manufacturing and distribution and concentration of power, where they control 90 percent, and sometimes even 100 percent of the milk, then we need to take another look at it and see what is happening to the people of this country. And particularly to New York. Again I refer you to that situation up there.

Thank you.

Senator BREAUX. Thank you, Mr. Chairman.

Senator GORE. You have a green light, if you want to——

Mr. QUARLES. Excuse me, Senator Breaux. May I make a comment to one of the earlier——

Senator BREAUX. I would tell the Chairman that they are using up all my time. I am not asking a lot of questions. They are just talking on my time.

Yes, sir.

Mr. QUARLES. Excuse me, sir, but you had asked earlier about the one study that was mentioned in the statement the USDA has made on cooperatives. The USDA has a body of regulations, or rules for purposes of doing investigation of cooperatives. That was only one example. Presumably there are others that are not public.

Second, with regard to——

Senator BREAUX. On that point, I am not arguing they have authority to do it. I just question whether they are actually doing it. It has been over a decade since the last time they have looked at your industry. If they have all the authority in the world, if they are not exercising it, they might as well not have it.

Mr. QUARLES. Well, they do have this body. To our knowledge, that study is the only one that has become public.

Senator BREAUX. Does that not kind of say, hey, we are getting along pretty good?

Mr. QUARLES. Well, as a matter of fact, we think they are getting along pretty good with regard to cooperatives.

Senator BREAUX. But they are not doing anything. Can you really make an argument that the Department of Agriculture is aggressively looking at pricing policies with regard to dairy cooperatives? It is hard to say that, since the last study was a decade ago, that they are really actively looking at this.

Mr. QUARLES. Well, I do not wish to comment on the dairy cooperatives. We have to keep in mind the cooperative issue is far broader than dairy, though. Fruit and vegetable cooperatives, for example.

As far as the need for cooperatives today, your question on that, typically in the California specialty crop industries the typical farmer farms somewhere less than 50 acres. In our particular industry, it is something less than 40 acres apiece. So there are in general a very large number of small farmers.

Our customers over the years tend to be——

Senator BREAUX. I am sorry? Which is your industry, Mr. Quarles?

Mr. QUARLES. The citrus business.

Senator BREAUX. What is your average sized farm as far as, I guess, gross sales?

Mr. QUARLES. Well, it would be—well, I cannot answer that. All I know is the farmers——

Senator BREAUX. I am talking about size. You know, back in the old days if you were in the oil business you could have one acre and make an awful lot of money, but not any more.

Mr. QUARLES. I understand. I understand, but I just simply do not have that number. The thing is that over the years the buyers have tended to become larger, the chains, as a matter of fact, in domestic markets the chains are the major purchasers of agricultural commodities.

Senator BREAUX. Do you all have marketing orders in the citrus cooperatives?

Mr. QUARLES. Oh, yes. Yes. It is so important that we have agricultural cooperatives because individual farmers simply cannot bargain effectively with the chains. But given the collective bargaining power through the cooperatives, the farmers can bargain effectively in the marketplace. That is why they Capper-Volstead Act is important today, and is as viable today as it was when it was originally enacted.

Senator BREAUX. Thank you, Mr. Chairman.

Senator GORE. Thank you, very much. That was very interesting.

I would like to express our thanks to all four of you for joining us and helping us. We are going to have to move on to the next panel. We appreciate it.

Mr. QUARLES. Thank you.

Mr. WAGNER. Thank you

Mr. RANDALL. Thank you.

Senator GORE. Our next panel is made up of Mr. William W. Suttle, Senior Vice President for Federal Affairs with the American Insurance Association; and John S. Satagaj, President of the Small Business Legislative Council based here in Washington.

We are delighted that both of you could join us. Without objection, the full text of your prepared statements will be included in the record. You are invited to present a five-minute summary.

I might ask for your understanding of the fact that I am going to turn over the gavel briefly to my colleague, Senator Breaux, as I express the lack of enthusiasm in my State for becoming the home of the Nation's temporary nuclear waste dump site. Then, having fulfilled that mission, I will return.

But, Mr. Suttle, if you will begin with your statement, Senator Breaux will be presiding. Thank you.

STATEMENT OF WILLIAM W. SUTTLE, SENIOR VICE PRESIDENT FOR FEDERAL AFFAIRS, AMERICAN INSURANCE ASSOCIATION

Mr. SUTTLE. Thank you, Mr. Chairman.

As one from just across the border in Western North Carolina, I appreciate your efforts on behalf of your home State at this time.

I appreciate the opportunity to be here today and our statement has been filed for the record. I will try to be as brief as possible, and then to respond to any questions that you or other Members of the Subcommittee may have.

In the 96th Congress, the American Insurance Association, along with others, supported the efforts of then-Chairman Cannon and current Chairman, Mr. Hollings, and others to clarify with absolute certainty the limitations placed on the Federal Trade Commission by the McCarren-Ferguson Act of 1945. We think the Congressional action of 1980 made good law, and we are convinced that the six-year history of that Act has proven its merit.

When Commission Chairman Oliver and others complain about the inability of the FTC to investigate insurance practices, they create two serious misconceptions.

First, they would have you believe that insurance is unique in being the only industry beyond their investigatory jurisdiction.

Secondly, they imply that all activities of insurance companies and agents are exempt from FTC oversight and enforcement. Each assertion is misleading, at best, because both are blatantly incorrect.

In the first instance, one must only look to the plain language of the Act to see that in addition to insurance, even broader exemptions also exist for banks, savings and loans, common carriers subject to other regulatory authority, among others. The Congress has clearly indicated over the years that for businesses subject to other effective regulatory schemes, duplicative, expensive FTC authority will not lie.

Small business ventures are also granted certain exceptions from FTC reporting requirements. The business of insurance is extensively and effectively regulated by the Several States, so the McCarren exemption from FTC application is justified and consistent, we believe, with sound public policy.

With regard to the second misleading point, the insurance exemption from FTC jurisdiction is far from absolute. First, both McCarren-Ferguson and the 1980 exemption amendment only restrict FTC authority to "the business of insurance," a term that has been clearly and narrowly defined by the courts over the last 40 years.

The FTC knows this, as can be witnessed by their recently concluded action against TICOR in which they assert that certain practices of title insurance companies in setting rates for loan closings is not the business of insurance, and therefore clearly subject to the jurisdiction of the Commission.

Secondly, neither the McCarren-Ferguson Act nor the FTC Act exempts insurers from alleged acts of boycott, coercion, or intimidation. Again, the FTC is also well aware of this limitation. Within the past two years, the Commission has concluded, or has undertaken several investigations including the conclusion by consent order of an extensive investigation of one of the largest insurer-agent organizations in the country.

Yet, the very 1980 Amendment which Chairman Oliver attacked on yesterday contains a provision for FTC studies in reponse to a resolution from the Commerce Committee of either this body or the House of Representatives. Your colleagues in the House have not been reluctant to seek such investigations, since at least four have been concluded—or have been requested by the Energy and Commerce Committee, and concluded by the Commission since the 1980 Act.

These have included information or studies with regard to the amount of information available for consumers of automobile insurance; information available for consumers of life insurance products; and the impact of rating bureaus on competition in the insurance industry.

Finally, we, too, are impressed by the Chairman's statements concerning reductions in the budget of the FTC, their inability to carry out their statutorily mandated investigation and enforcement authority, and we would suggest that they should not be further burdened by having to do more with the business of insurance than is currently allowed by statute. We believe that the 1980 Amendment made good law, Mr. Chairman, and that it continues to be sound today.

Once again, we appreciate the opportunity to discuss this with the subcommittee.

[The statement follows:]

STATEMENT OF THE AMERICAN INSURANCE ASSOCIATION

Mr. Chairman and members of the Consumer Subcommittee. I am William Suttle, Senior Vice President for Federal Affairs of the American Insurance Association (AIA). I appreciate the opportunity to appear before you today on behalf of our member companies in support of the retention of the limited exemption from studies or investigations of the insurance industry by the Federal Trade Commission (FTC).

As the Chairman and members of this Subcommittee know, the business of insurance, to the extent it is regulated by the states, is exempt from the jurisdiction of the Federal Trade Commission except in cases involving boYcotts, coercion or intimidation, by virtue of the McCarran-Ferguson Act. This exemption is not unique as it similarly applies in degree to the banking industry, savings and loans, the securities industry, the communications industry, common carriers and public utilities. All of these industries are granted this shield from full Federal Trade Commission scrutiny because they share the common characteristic of being subject to extensive regulation by the states or other federal agencies. This is certainly true of the insurance industry which is heavily regulated at the state level.

Activities of insurers which do not fit within the definition of "the business of insurance" or are not regulated by the states, are not protected from FTC investigation.

The current statute limiting the authority of the Federal Trade Commission over the insurance industry was enacted in 1980 when the Congress last passed a free-standing Federal Trade Commission reauthorization bill. The final bill incorporated an amendment offered by Senator Cannon to S.1991 in the Senate Commerce Committee. The Cannon amendment did not provide a total exemption for insurers. Instead, it said that the commission may only conduct studies at the request of either the House or Senate commerce committees.

In many respects the Cannon amendment was a response to the problems which existed in the 1970's when the Federal Trade Commission sought to unilaterally extend its jurisdiction over the insurance industry in spite of the plain language of the McCarran-Ferguson Act. During that period the Commission had initiated no less than 30 separate insurance investigative proceedings costing millions of taxpayer dollars. Furthermore, the Commission was, at this same time, attempting to begin Trade Regulation Rule proceedings in areas already regulated by the states. It was subsequently determined by the Congress that the Federal Trade Commission had clearly overstepped its statutory authority.

Mr. Chairman, allow me at this point to elaborate further what we believe to be the proper but limited role of the Federal Trade Commission with regard to insurance as clarified by the Cannon Amendment in 1980.

Congressional hearings during the years leading up to the 1980 action, uncovered numerous Commission activities clearly outside its authority. The FTC had refused, ignored, or both, to observe the Congressionally imposed limits on its jurisdiction in the McCarran-Ferguson Act. As you and the Subcommittee know, the McCarran Act specifically gives the states the authority to regulate insurance free of FTC interference. However, despite this specific prohibition, during 1978 and 1979, Congress found that the FTC had undertaken a wide ranging and free-wheeling program of unauthorized investigations of the insurance industry. These investigations had exactly the results the McCarran Act sought to avoid; interference with the states appropriate right to regulate the business of insurance.

The Commerce Committee had, in 1980, undertaken a thorough legal analysis of the statutory language and underlying legislative history of the McCarran Act. Both made it clear that the authors of the McCarran Act intended, where the statutory prerequisites for exemption were satisfied, that the Federal Trade Commission had no jurisdiction under the Federal Trade Commission Act. In particular, Congress in the McCarran Act, made no distinction between the Provision of the FTC Act governing the Commissions law enforcement function and those governing its separate fact finding function. In either case, where an activity comprises part of the "business of insurance" and is "regulated by State law," Congress divested the FTC of jurisdiction so as to eliminate the possibility that the States' regulatory efforts would be invalidated, impaired or superseded.

Accordingly, the Senate Commerce Committee and finally the full Senate as well as the House of Representatives adopted the conference report agreeing that the FTC's authority must be clarified in order to prevent further Commission interference of state regulatory authority over the "business of insurance."

The 1980 language was clear—the FTC was clearly limited in its authority to investigate certain insurance activities. Furthermore, the Commission was charged not to undertake any new investigations on its own and to terminate all ongoing studies at the time except for the joint effort with what is now the Department of Health and Human Services relating to a "medi-gap" study.

During the Senate's debate of the conference report containing the limited insurance exemption language, Senator Cannon stated and I quote, "I am particularly disturbed by the Commission's attempts to substitute its judgement for that of the states on what is an appropriate regulatory philosophy. In the McCarran Act, Congress intended to leave the states freedom to choose whatever regulatory structure they deemed appropriate."

During this same debate, Senator Ernest F. Hollings added, "I cannot emphasize strongly enough that this amendment reafirms the basic purpose of the McCarran-Ferguson Act—to leave the job of insurance regulation to the states."

The history of the FTC since the 1980's bears out the wisdom of the Cannon amendment. The spurious and expensive investigations that were never authorized by Congress were finally put to rest. Yet at the same time, the interests of consumers were protected by elected officials on the House and Senate Commerce Committees who have shown no reluctance in asking the FTC to investigate subject matters relating to insurance which theY viewed in the public interest.

I want to relate to you some of the investigations of the insurance industry which have taken place since 1980. This should allay concerns expressed by some that the insurance industry is not subject to proper federal jurisdictional oversight.

In May of 1983 the House Energy and Commerce Committee requested the FTC to undertake a study of the availability and utility of information furnished consumers before the Purchase of automobile insurance. The same Committee in 1983 also requested the FTC to conduct a study of the impact of state insurance rate bureaus and other collective ratemaking practices on competition with respect to property and casualty insurance for automobiles.

The FTC studies authorized by Congress were not limited to the property and casualty insurance industry. The FTC in late 1985 released the result of their study on the advantages and disadvantages of the different types of life insurance policies and the adequacy of consumer information about these policies. In 1986 the FTC was asked to provide a report on preferred provider organizations.

Moreover, other activities related to insurance but outside the strict definition of the "business of insurance" remain subject to FTC oversight even without a request from Congress. Most recently the Commission concluded a detailed investigation of title insurance companies. The Commission argued successfully before an Administrative Law Judge that title insurance activities did not involve the spreading and sharing of risks and thus are not subject to the Provision of the McCarran-Ferguson Act. Within the past two years the FTC has also concluded an investigation, closed by a consent order, of alleged "boycott" activities by a large insurance agent organization.

Mr Chairman, the American Insurance Association contends that the statement Chairman Hollings made in support of the Cannon amendment in 1980 is as true today as it was then. Unless specifically authorized by Congress, the FTC should respect the jurisdictional prerogatives of the states which are entrusted with responsibility to regulate the insurance industry under the McCarran-Ferguson Act. We, like most other regulated industries, are forced to remain responsive to the concerns of those who use our products not only by market realities but by the regulators who have responsibility for monitoring our conduct. It is possible there may come times when concerns may be of sufficient magnitude to require an FTC investigation. Yet, in our view, this end is accomplished by the 1980 amendment under discussion which enables elected public officials to make that decision. At least four times in the last six years Congress responded to what it perceived to be a problem and asked the FTC to investigate some aspect of the insurance industry. There is no reason to believe that Congress will be any less reluctant to exercise its prerogatives in the future should serious problems arise.

In summary, we contend that the 1980 insurance investigation amendment to the Federal Trade Commission Act made sound law, and we urge its retention when the Commission is reauthorized.

Senator Breaux [presiding]: Thank you.

Mr. Satagaj?

STATEMENT OF JOHN S. SATAGAJ, PRESIDENT, SMALL BUSINESS LEGISLATIVE COUNCIL

Mr. SATAGAJ. Thank you, Mr. Chairman. It is a pleasure to be here today.

I am here as President of the Small Business Legislative Council. It is a coalition of approximately 90 trade associations. We feel we fulfill a unique role in Washington in that these 90 associations represent nearly every economic sector from brick distributors, to nurserymen, from retail grocers, dairies, automobile service associations nearly every sector of the economy. So we believe we bring a unique perspective to the problems of small business.

I should start out by saying that we are very strong supporters of the FTC and obviously are here to support reauthorization of the agency. It has been an important agency, and probably one of the top three agencies in government in terms of helping the small business community.

I would like to hit on four points here briefly that are of concern to us.

The first one is Robinson-Patman. Robinson-Patman has been the one law of essential concern to small business over the years. It has helped promote a competitive, vigorous small business community, and we believe that enforcement of that law and any activity related to predatory pricing is of utmost importance, and therefore we encourage this Committee through this reauthorization process and through the oversight to ensure that the FTC continues to be involved in enforcement of the Robinson-Patman and pursuing predatory pricing investigations.

Item number two is the subject of insurance. I am confident that this Congress is going to hear a lot of discussion about regulation of the insurance industry. We recognize that it is a very complex, multi-faceted problem. The White House Conference on Small Business last August, as you may know, passed a very comprehensive statement on what they called the tort reform/insurance crisis.

It contains components on product liability, tort reform, and insurance regulation. Now, if you ask a small business person what is it you want the government to do regarding insurance and tort reform, what they are going to tell you is "We just want stable rates. We want to know what these rates are; we want them to stay at one level, if it is possible; if they are going to rise, we want to know why; if they are going to be cut, we want to know why."

They do not care how we come up with a solution, but they do recognize that it is more complicated than just coming up with a stable price environment. Therefore, their recommendation does call for activity in the three areas I mentioned.

The one area that is pertinent to the activities of this Committee and of the Federal Trade Commission is the regulation of the insurance industry and the impact of the McCarren-Ferguson on the rate environment. Therefore, we are supporters of reinstituting the authority of the agency to examine what is happening in the insurance industry, and to assist in this process.

We recognize that it is going to take more than just the FTC's involvement to ensure a stable regulatory environment. We must discuss data collection. We must discuss the role of the States in regulating the industry. However, we believe that the FTC's involvement iwill enhance the process.

Agenda item number three: Dialogue. Dialogue is very important to an organization such as my own. We have 90 trade associations. It is very difficult for us to agree on anything without discussion and concensus. We recognize its importance, and we work very much out in the open.

In the past, we have enjoyed a very good relationship with the FTC. Under Chairman Miller, we frequently disagreed on topics, however he was always willing to listen to us and discuss the issues of the day, and we think that is very important. We have met with Chairman Oliver and we have discussed many of the issues that are before you today and will be before you in the future. We are quite pleased by the establishment of dialogue. I do want to emphasize that we have started on a positive note in trying to conquer the issues that confront us and the Commission.

The final area is leadership. We have a gut feeling, and unfortunately it is not yet documented, about where we have gone in the last six years in relationship to big business to small business in the marketplace. We feel perhaps small business is not yet feeling the impact of mergers, takeovers, capture of the market share that has taken place in the economy over the last few years.

We do feel that there is an obligation which can be fulfilled by the FTC to examine where we are in this economy and where small business stands as an integral competitive part of our economy. Therefore, we encourage the FTC to be aggressive in determining where we stand in the economy.

Mr. Chairman, that summarizes my comments. I want to offer our support as this Committee proceeds to work on the reauthorization bill, and we look forward to its prompt passage.

Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF JOHN S. SATAGAJ, PRESIDENT SMALL BUSINESS LEGISLATIVE COUNCIL

Mr Chairman: Thank you for the opportunity to appear before your Subcommittee considering FTC funding and proposals regarding its powers and jurisdiction. On behalf of the Small Business Legislative Council, I am pleased to have an opportunity to present to you our views concerning the importance of a strong, vigorous FTC to a healthy, competitive small business economy.

As you may know, the Small Business Legislative Council (SBLC) is a coalition of approximately ninety trade and professional associations representing more than four million small business organizations. SBLC has been in existence over ten years and its sole goal is to provide a means by which small business may make its concerns known to Washington and enhance the role of small business in our competitive marketplace.

Because of our interest in free and open competition, we have a stake in the future and operations of the Federal Trade Commission. As you know, legislation which created the FTC was approved by Congress in September 1914 after three political parties supported the creation of this agency. The central feature of the FTC Act—its grant of authority to take action against corporations and persons engaged in undefined "unfair methods of competition and deceptive acts and practices" was included in the Act to help preserve small business entities from the Predatory practices of larger corporations and stop predatory practices in their incipiency.

Mr. Chairman, the Federal Trade Commission has served the public interest well at a minimal cost to the taxpayer. This relatively small federal agency has over the years defined many unfair methods of competition and deceptive acts and practices that inflict injury on the public, as well as to small business concerns. This is why SBLC earnestly supports a strong FTC.

Last year, 1800 representatives of small business throughout the country attended the White House Conference on Small Business to determine those legislative objectives that are most desired by business concerns. Antitrust enforcement was a priority included in the final recommendations of the Conference. It will be no surprise to this Committee to be advised that the 1936 Robinson Patman Act designed to eliminate price discrimination, is of paramount importance to small business concerns. This statute that was enacted after an investigation by the Federal Trade Commission in 1936 of the rise and expansion of chain stores is designed to ensure that all competitors compete on an equal footing. Small merchants that must pay higher prices for the same goods as those purchased by their larger rivals suffer a heartbreaking disadvantage in competing for sales to customers. Similarly, when large national corporations engage in predatory pricing with the intent of eliminating smaller and regional competitors, they pose a direct threat to small business. We have met with Chairman Oliver of the Commission and expressed our concerns regarding enforcement activities and we believe the interest of Congress, through oversight hearings, ensures that the Commission will respond to the need to conduct investigations. We believe the FTC should continue to hold hearings investigating predatory pricing on an industry by industry basis. We would hope that the Commission would continue its focus in this area and pursue additional investigations looking into pricing problems causing injury to independent business.

Small business continues to suffer the consequences of what we call the tort reform insurance regulation crisis. At the 1986 White House Conference on Small Business, the number one recommendation was a comprehensive statement on the tort reform liability insurance crisis. The recommendation acknowledged the fact that the crisis is a multifaceted problem requiring action in several different areas. The three major components of a comprehensive solution are reform of the civil justice system, enactment of a federal product liability bill and closer scrutiny of insurance industry regulation. In 1986, much of the federal activity was focused on tort reform and product liability. A number of States enacted significant civil justice reforms and a national product liability bill made it to the floor of the Senate. Insurance regulation was placed on the back burner. In 1987, we expect greater attention to be paid to the subject of insurance regulation.

The foundation for the policy position of the White House Conference recommendation is the desire of small business to achieve one goal—to ensure the availability of affordable insurance. It is fair to say that it is not so much how we achieve this goal, but that we do, indeed, achieve it. The White House Conference recommendation acknowledges it will take action in each of the major policy areas to insure a lasting, stable insurance environment.

Although the property\casualty insurance industry is a $300 billion dollar industry, there appears to be significant concern regarding the availability of information on the industry necessary for the public and regulators may make informed decisions. State regulators express frustration and there is, of course, no true federal regulation of the

industry. We believe, at a minimum, that Congress must ask whether better information and data collection is necessary and appropriate. In the 1970s, the Federal Trade Commission (FTC) conducted and released a study of the life insurance industry and issued a critical report. The Commission cited the lack of information and confusing wording of the insurance policies. The FTC said the life insurance policies were really saving accounts more than insurance. The FTC called on the state insurance commissions to adopt a model disclosure requirement for the industry to provide potential insurers with useful comparative data to enable them to make informed purchasing decisions on life insurance.

As a result, Congress, in 1980, amended the FTC's authorization forbidding the FTC to investigate or even study the entire insurance industry in any areas related to the McCarran-Ferguson Act exemption. The law does provide that the FTC can study or investigate if either the Senate or House committee of jurisdiction over the FTC specifically requests the FTC to do so.

By and large, federal regulation as a concept does not sit well with small business. We are prepared to say at this time, however, that the scope of the McCarran-Ferguson Act should be revisited and that we must examine what improvements can be made in the insurance regulation system. For the purposes of your responsibilities regarding the FTC, we certainly believe it is proper for you to reconsider the role FTC might play in ensuring implementation of the insurance/tort reform crisis recommendation of the White House Conference on Small Business and providing adequate data on the insurance industry. We must ensure small business access to affordable insurance.

We also hope that Chairman Oliver will continue the open door policy of Chairman Miller and that individual Commissioners and Bureau Directors will meet with small business groups and discuss our concerns and objectives. The Commission has a wide array of law enforcement tools at its disposal and compliance with the law requires that businesses know what is expected of them and that consumers know their rights. The Commission, under Chairman Miller, placed high importance on clarifying rules and educating businesses and consumers. Its approach in seeking voluntary compliance with its rules and the laws it has responsibility to enforce, achieved enforcement with a minimum of expense to the public. Of course, litigation is necessary in those circumstances where a person is unwilling to comply or an order is necessary to prevent future violations. When the Commission does use its authority to institute litigation, we would ask that they carefully consider the remedies that may be employed.

We have noted a disturbing trend by the FTC in recent years to file lawsuits in the United States District Court seeking harsh penalties from small business concerns when the administrative process culminating in a cease and desist order would have been sufficient. The FTC was established to ensure that business concerns violating its statutes would be the subject of a cease and desist order which enjoins the malefactor involved from future violations at the threat of being fined $10,000 a day. Parenthetically, we note that the penalty has been the same for many years. It may be that the fine itself should be increased. However, in numerous instances, the Commission elected to proceed directly into the United States District Court to sue for substantial civil penalties bypassing the administrative remedy of a cease and desist order. Many of these actions were brought under Section 205 of the Federal Trade Commission Act which is a highly unusual and harsh remedy that should not ordinarily be employed. As you know, Section 205 provides that a person may be sued for civil penalties if it violates a rule of law for which it had notice involving a third party. We believe that the Federal Trade Commission should not skip over its own administrative law judges who have special training and knowledge dealing with unfair methods of competition and deceptive acts and practices. We believe that continued and expansive use of the district courts will result in a strong backlash and the Commission will suffer the consequences of having abused its discretion in formulating rational remedies.

SBLC does favor the approach the Federal Trade Commission has taken in recent years with respect to rulemaking. It now appears that it is acting in a sensible and rational basis in eliminating deceptive practices and yet not destroying small business concerns in the process. In the past, too much emphasis has been placed on remedies

that impose a heavy burden on small business concerns such as requiring refunds simply for the asking by the consumer. Also, many rules provided unilateral rights to consumers to cancel contracts without regard to the injury inflicted upon the businessman. The present approach to rulemaking is sound and does not result in severe economic problems for small business concerns.

Similarly, in recent years the Bureau of Competition had been stressing and placing greater emphasis on horizontal arrangements that deprive small business concerns of the opportunity to compete. We would, however, caution the Commission to move slowly in challenging arrangements by small business concerns that band together to engage in group buying or jointly market goods. Only through joint efforts can small competitors compete with large rivals such as mass merchandisers.

During the debate on the Tax Reform Act of 1986 we expressed some concern regarding the effects the bill would have on small business's ability to compete against large firms. In particular we had a great deal of difficulty accepting the corporate rate structure as imposed, with the sweeping revisions in other business tax sections. In our view, the Tax Reform Act of 1986 adds to what we already believe to be an increase the concentration of economic power in this country. It is time for us to take a serious, realistic look at the activity which has taken place in our economy over the last few years. The FTC should, and must assume a leadership role in making sure we, first, have the information necessary to evaluate this situation, and second, act to make certain we reverse this disturbing trend towards concentration of economic power.

Finally, as in the past, we recommend a line item for Robinson-Patman enforcement be included in the FTC appropriations. In that manner we can be assured that this important statute will receive appropriate attention.

Mr. Chairman, we appreciate your Subcommittee's interest in the policies and programs followed by the Federal Trade Commission. We believe that it is a very healthy and rewarding exercise for this subcommittee to conduct its oversight of the Federal Trade Commission and the work that it is doing in the marketplace to stem abusive practices and unfair methods of competition. If authorization is granted to the Federal Trade Commission, as we have recommended, you will certainly be able to continue your worthy efforts to continue reviewing FTC policies. We wish to commend you for your efforts and thank you for the opportunity to appear here today.

Senator BREAUX. We thank the panel very much for their testimony and their presentations. I note that the Senate bell rings just like the House bell rings, and that indicates a live quorum which we are going to have to go and answer.

So what I will do is recess, because we do have some questions I would like to ask the panel, and as soon as we catch the quorum call the Committee will return.

The Committee will be in recess.

[Recess.]

Senator Breaux [presiding]: Mr. Suttle, when we had the hearings yesterday, Mr. Oliver from the Federal Trade Commission said in his testimony regarding the limitation of the FTC Act on the Commission's ability to study the business of insurance, that the FTC Act now precludes the Commission from conducting studies or preparing reports concerning insurance unless a majority of the Members of the Committee request that they be allowed to do so.

His statement said that he saw no reason to continue that prohibition, and that they would like to have that authority. Why would the insurance industry argue against changing the 1980 law?

Mr. SUTTLE. Mr. Chairman, first of all, we do think that the 1980 Amendment is consistent with other public policy. As I had pointed out in the statement, we are not the only industry from which the FTC is precluded from doing investigations on its own initiative.

Senator BREAUX. Of course I do not think that is a reason. That is just a fact that maybe all the rest of them are wrong, too, and they should be studied, too.

Mr. SUTTLE. We will get to that. The reason for the policy, is that insurance is already a highly regulated business. It is subject to all kinds of examinations and regulations by the several States.

However, the authority is far from absolute. One, it is limited to what the courts have defined as "the business of insurance." That is something that involves the spreading of risk, generally; and the courts also said the intimate relationship between policyholder and insurer.

They certainly are not precluded from studying any allegations of coercion, boycott, intimidation, practices of insurance companies that do not involve spreading of risk, nor are they precluded, as he points out, from studying those things if a majority of the Committee on Commerce in either House requests that they do so. That was the safeguard that the Congress, in its wisdom in 1980, wrote into the Amendment in the Act.

As I pointed out earlier, the House Committee, on at least four occasions, has called for such studies. We have, on at least two of those occasions where they impacted our companies, written to Mr. Dingell and Ranking Member Mr. Broyhill and said we have no objection; let them go ahead and do it.

Therefore, we think there is an abundance of opportunity for the Commission to study any portion of our business that they believe needs examination. Hoewever, since we are a highly regulated industry, and since the more than 30 examinations that they had ongoing on their own initiative in 1979-80 offended this Committee and offended the Congress and caused the specific limited exemption to be enacted, we see absolutely nothing wrong with the Commission having to request of this Committee or of its companion Committee on the House side that something needs to be studied, give us the authority to do it.

Therefore, we do not believe that the Commission is unfairly or unduly limited in its investigatory powers of our industry at all.

Senator BREAUX. Mr. Satajaj, you represent a lot of people that buy insurance. Do you agree with Mr. Suttle? Do your members agree with the fact of the 1980 limitation on the FTC's ability to study the business of insurance is proper?

Mr. SATAGAJ. We definitely do not agree with him. I think the problem becomes that, while this is a highly regulated industry, it is global in nature, let alone interstate, and we lack proper information, despite all that regulation, about the industry and the ability to regulate it effectively.

I have got to tell you, honestly, that within the small business community there is a deep concern whether we want Federal regulation. This is just a Federal study of the industry. We are at a cross-roads, and the first step is a study before we get into Federal regulation.

Senator BREAUX. Mr. Suttle just listed a whole bunch of areas that in fact he says FTC was in fact looking at, covering a whole range of items that he just listed. What would you have FTC or your members like to see the FTC have the authority to study that they in fact cannot study now?

Mr. SATAGAJ. I think the major objective of the study truly is to gather the information on the ratemaking process. That is an oversimplification of what it is, but that is where we are heading.

Mr. SUTTLE. Mr. Chairman, in that regard——

Senator BREAUX. Mr. Suttle.

Mr. SUTTLE.——I would refer Mr. Satagaj to the study just concluded by the FTC during the 99th Congress relating to Rating Bureaus and their impact on pricing in competition. If he wants that study, it was completed and it was done by the Commission. It was delivered to the Committee on Energy and Commerce, and it is available for his examination. Again it has already been done.

Senator BREAUX. Senator. Kasten.

Senator KASTEN. Mr. Chairman, I have no questions at this time.

Senator BREAUX. How do we respond as Members of Congress on the very difficult question of product liability, and all the battles that we have experienced in the Congress last year, and probably will continue to experience in this Congress, from those who would argue, Mr. Suttle, that it is not the lawyers' fault; it is the insurance. The insurance companies say it is not our fault, it is the lawyers' fault.

We had hearings last year, that I chaired on the House side, with regard to the problems of insurance in the fishing industry. We had witnesses come before the Committee at that time that told us they had been in this business 30 years, never had a claim and never had an accident. They stated that this year they received notification that their insurance has been cancelled, without ever having filed a claim. The year before, they increased the premiums by 800 percent. This year, they cancelled. They want to know what can be done about it.

Some would say, the FTC ought to investigate that. The FTC would say that they are prohibited from investigating these types of claims.

What is your industry's response to that claim?

Mr. SUTTLE. First of all, Mr. Chairman, I would say that if your constituents, and we know that fishing vessels were among the industries that had difficulty with liability insurance, are concerned that they are being boycotted by the insurance industry, then today the FTC has jurisdiction to look at that, just as they looked at the insurance agent organization that they claimed had boycotted or was encouraging its members to boycott a given company.

So today, I would say that if the fishing industry alleges that the insurance industry is boycotting them, the FTC now has the authority to look into this matter.

If the fishing industry claims that there is something wrong with the ratemaking process, then I would suggest that either this Committee or its counterpart in the House could call on the FTC to examine this subject. However, the FTC wrote to the Department of Justice less than

a year ago—I have a copy of the letter that Mr. Ginsberg, the Assistant Attorney General for Antitrust, wrote to someone who had inquired—and said the FTC had looked for them and determined that there was no evidence of colusion among insurance companies that was causing rates to go up or coverage to be cancelled.

Evidently the FTC has already looked at it. At least they told the Department of Justice's Antitrust Division that they had. As we know there are problems underlying the liability insurance system.

Mr. Kasten was a very strong, vocal, and articulate advocate of some Federal product liability reform. There have been others in Baton Rouge and other places supporting other kinds of reforms that go under that effort. However, whether or not the Federal Trade Commission that has the authority to examine trade practices and to do certain enforcement activities and whether their ability to examine what is going on in a given industry has any impact on that industry is something that I would say is terribly questionable.

If it is not, if it is a problem they ought to address, then I think the Committee on Commerce on this side of the Capitol or the other would be happy to ask them to do so.

Senator BREAUX. Let me ask one other final question. Some would make an argument, Mr. Suttle, that the industry points out that you do not need this extra layer of Federal regulation because the States do that, now that they have State Insurance Commissioners that participate in setting the standards for the State.

I would imagine that a number of Mr. Stagaj's members would say, this is the United States of America. I operate a business in 50 States, and I am having to look at 50 different sets of rules, and regulations, and standards, that when I take my business across an imaginary boundary line between the State of Texas and Louisiana, that all of a sudden I am in a whole different world.

And if I go to a third State, I am looking at a third set of rules and regulations. Is this not enough of a national interest to have a national policy with regard to standards and operating procedures? Can we not just bring it under the umbrella of the Federal Government, as opposed to 50 separate State systems?

Mr. SUTTLE. Certainly, Senator, there are those who could make that argument. We think that is not necessary. We would point to the results over the past 40-odd years since McCarren has been in place, and before that when the Court had ruled that the business of insurance was local and not interstate commerce, to say that we have not found a federally regulated industry, be it national or local, serving the consumer better than the business of insurance.

And we think that the system of State regulation has proven itself and, has proven itself well over the last 40 years. We would compare how it responds to consumers to any other industry that is regulated on the Federal level. One can always make the argument between State and Federal regulatory policy and authority in any industry. I would think, but again in our case I would only point to the record. I would say the record clearly speaks for itself.

It shows strong, effective regulation. It is the only industry in the country that has come forward on its own and passed laws in every State to guarantee that policy holders and claimants are not left wanting in case of insolvency. We think that all across the board the system has worked, it has worked well, and no one has shown us any benefit for either substituting a single Federal regulatory authority, or overlaying a separate, additional, more expensive do-all form of regulation.

I do not question that the argument can be made. I just think the record speaks for itself. It shows effective regulation, effective response, and I believe even Mr. Stagaj's members would agree that the folk in Baton Rouge, Nashville, Madison, who regulate this industry have been responsive to their needs, to the extent that they have been able to do so, and that they would prefer to keep regulation closer to their membership and closer to the people than setting it apart in the Nation"s Capital.

Senator BREAUX. Thank you, Mr. Suttle.

Thank you, MR. Chairman.

Senator Gore [presiding]: Thank you for your indulgence of my need to attend that other meeting of such extreme importance to my home State. I have read your prepared statements very carefully, and I will look forward to reviewing the interchange between the two of you and the Subcommittee.

We appreciate your appearance here a great deal, and thank you.

Mr. SUTTLE. Thank you, Mr. Chairman. If the Subcommittee has additional questions, we would be happy to submit the answers for the record.

Senator GORE. We may well do that. Thank you so much.

Mr. SUTTLE. And good luck in your other efforts.

Senator GORE. Okay, for our part of the country.

Mr. SUTTLE. That is right.

Senator GORE. Now our third and final panel is invited to come to the witness table at this time.

Mr. Gilbert Weil, General Counsel to the Association of National Advertisers; accompanied by Mr. David Versfelt, who is General Counsel of the American Association of Advertisers.

And secondly, Professor David Rice, from Boston University and Rutgers-Newark Schools of Law.

We welcome all three of you to the witness table. Without objection, your prepared remarks will be included in the record. Please proceed with a five-minute summary beginning with Mr. Weil.

Welcome.

STATEMENT OF GILBERT H. WEIL, COUNSEL, ASSOCIATION OF NATIONAL ADVERTISERS INC.; ACCOMPANIED BY DAVID S. VERSFELT, COUNSEL, AMERICAN ASSOCIATION OF ADVERTISERS

Mr. WEIL. Thank you very much, Mr. Chairman.

Mr. Rogal, General Counsel for the American Advertising Federation, wishes me to express his regrets that he is not here today, but a wide part of the Pacific and the broad Continent of the United States separates him from these august halls.

Together, our three trade associations which are national represent the overwhelming majority of people and companies that make up the American advertising industry. We deeply appreciate the opportunity you give us to point out that the same public interests which sired the Federal Trade Commission and enhanced its powers by the Wheeler-Lea amendments remains. It calls as clearly now as then for its authorization.

Those compelling salutary purposes were so cogently articulated by the Court of Appeals for the District of Columbia in Holloway against Briston-Myers Company that we quote from it at pages three and four of our written presentation. Further, failure to authorize FTC would create the unfortunate impression that Congress does not place a high priority on it as a key regulatory body. To the contrary, our associations have over the past several years deemed such authorization a top priority.

Because it has always been our Associations' fundamental policy to defend the First Amendment rights of advertisers, we must at the same time we plead for reauthorization of FTC express our concerns in four areas:

First, the plastic term "unfair" cannot constitutionally be a license for the FTC to abridge commercial speech—advertising. In our written presentation we present our case on unfairness more fully than can be done here. Very briefly, however, what may or may not be deemed "unfair" is a value judgment that can veer from person to person and from time to time. It is highly subjective and ideological—an in-the-eyes-of-the-beholder phenomenon. It enables two or three commissioners to censor truthful advertising, and is not the sort of stuff censorship should be made of.

Next there is the matter of the chaotic regulatory scene that would be created if every State attorney general in the Nation were ordained as a prosecutor under the Federal Trade Commission Act.

The Holloway court"s descriptions of the essential concepts of the FTC Act are a vibrant orchestration of our theme that such ordination would demolish what your predecessor legislators wrought.

The court held that a private party cannot enforce the Act, and its reasons are—if anything—even more applicable to State attorneys general.

The court pointed out that establishing 200 and more Federal District Courts as oracles of the Federal Trade Commission Act would make it impossible to have a centralized source of judgmental expertise and discretion such as the FTC to crystallize nationally coherent laws, in the light of an "interplay of [a host of] factors", many of which the court specifically cataloged.

The Commission, said the court, must be left as the central and sole authority "to weigh each action against [its] broad range policy goals and to determine its place in the overall enforcement program of the FTC." To set up every Federal District Court in the land as a mini-FTC would defeat that core purpose.

Try to imagine, for example, 200 and more District Courts struggling in the face of the vacuous criterion "unfair," if you allow it to remain in the Act, to formulate a nationally coherent policy as to its administration.

"The consequence", in the Holloway court's words, "would burden not only the defendants selected but also the judicial system."

Ironically that price would be paid for nothing of substance because, as we demonstrate specifically in our full statement, whatever constructive objectives sponsors of such legislation purport to espouse are fully achievable now without it.

Next, final effect should not be given to the Commission's cease and desist orders before judicial review. This neuters advertisers" court of appeals. Few advertising campaigns would be worth resuscitation after being terminated during an appellate blackout.

Thirdly, an appellate court's jurisdiction to review Commission censorship of advertising should be codified in accordance with established constitutional principles. The present statute, cast when it was deemed that commercial advertising had no First Amendment rights, is an anachronism. It causes misunderstanding and unconstitutional injustice in lower courts for advertisers who cannot get to the Supreme Court.

Lastly, an apparent empowerment of the Commission to promulgate a trade regulation rule upon "any ... information which the Commission considers relevant to such rule" should be elminated. It enables the Commission to stack the record and set the scales of justice atilt.

You will of course find all we wish we could have had time to say here in our written statement. For now, we thank you again and are ready and anxious for your questions.

[The statement follows:]

JOINT STATEMENT OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., THE AMERICAN ADVERTISING FEDERATION, AND THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC.

This statement is respectfully submitted jointly by the Association of National Advertisers, Inc. (ANA), the American Advertising Federation (AAF) and the American Association of Advertising Agencies, Inc. (A.A.A.A.), national trade associations which together represent the overwhelminq majority of all persons and companies that comprise the advertising industry in America.

Identification of the Associations

ANA is a not-for-profit corporate trade association, organized and existing under the laws of the State of New York with offices at 155 East 44th Street, New York, New York 10017. It is composed of almost 300 companies, with over 2,000 subsidiaries and divisions (many of which are relatively independent advertiser entities), located throughout the United States. They manufacture and sell a wide range of products and employ advertising as an important element of their marketing and public relations programs. Althouqh ANA's membership includes many of the nation's largest

advertisers, it also includes a large number of smaller ones. Approximately one-third of ANA members spend under $5 million annually for advertising. The common characteristic of all ANA members is that they purchase space and time from the media of mass communications.

The AAF is a national trade association which includes within its membership all of the various elements of the advertising industry. Its principal office is located at 1225 Connecticut Avenue, Northwest, Washington, D.C. 20036. The membership of the AAF includes companies that manufacture and sell consumer products, advertising agencies, newspaper and magazine publishers, radio and television broadcasters and networks and approximately 22 other trade associations with memberships composed of companies engaged in various advertising pursuits. The Federation also represents the "grassroots" of the advertising industry because it is the parent body of more than 200 local advertising clubs and federations located throughout the United States and having a combined membership of approximately 25,000 advertising practitioners. These local organizations, like the parent body, include advertisers, advertising agencies and media within their membership.

The A.A.A.A. is the national association of the advertising agency business. Its more than 560 members, both large and small, are located throughout the United States and handle approximately 75 percent of all national advertising placed by advertising agencies in this country. Its address is 666 Third Avenue, New York, New York 10017 and it maintains a Washington office at 1899 L Street, N.W., Washington, D.C. 20036.

We strongly urge that reauthorization, once and for all, of the Federal Trade Commission—cessation of perennial doubt and debate over continuation of its existence—is in the best interests of industry and consumers alike.

The salutary functions for which Congress created it are as vital today as when they accounted for genesis of its powers: and only a federal administrative agency such as FTC could be capable of implementing and exercising them.

They were cogently cataloged by the United States Court of Appeals for the District of Columbia in Holloway *v.* Bristol-Myers Company, 485 F.2d 986 (1973) as follows:

These factors suggested a statute whose prohibitions were couched in broad, generic terms, permitting application in a wide variety of commercial contexts and coping with evasive tactics. Yet this breadth of prohibition carried with it a dancer that the statute might become a source of vexatious litigation. Expertise was called for, both to identify trade practices that posed the threat of monopoly and to avoid using the statute as a vehicle for trivial or frivolous claims. There was, furthermore, a need to develop a central and coherent body of precedent, construing and applying the statute in a wide range of factual contexts, so as to define its operative reach. Finally, it would be of assistance to create a specialized forum where businessmen whose methods had been called into question could voluntarily revise their practices without the need to resort to the courts (Id. at page 990, footnotes omitted.)

* * * * *

The Wheeler-Lea Amendments represented a shift in emphasis, from the control of deceptive advertising practices as an incident of antitrust regulation to the avowed purpose of protecting the consumer from fraud. But in moving to achieve this goal Congress deliberately chose to entrust the regulation of advertising to an existing body, the Federal Trade Commission, whose methods and procedures were familiar and well established. Although the Wheeler-Lea Amendments extended the Commission's authority and added sanctions to its arsenal, Congress plainly intended these augmented powers to be exercised within the institutional matrix created by the 1914 Act. (Id. at pages 994-95, footnotes omitted.)

It has always been the fundamental policy of our associations to defendaqainst abridgment or erosion advertisers' right to advertise truthfully any product or service that can lawfully be sold. That position has been judicially confirmed in decisions of the Supreme Court of the United States that we shall refer to as appropriate later in this statement.

We appreciate the opportunity afforded us by this Committee to express our concern over three aspects of the present Federal Trade Commission Act ("FTCA") (and to suggest three amendments of the Act relative thereto), and with respect to two additions to the FTCA that are likely to come under consideration. Our proposed amendments 1) would remove the unconstitutionally vague concept of "unfair[ness]" as

a means for the Commission to abridge commercial speech (advertising); 2) would codify an appellate court's jurisdiction to review Commission censorship of a commercial advertisement in accordance with established constitutional principles; and 3) would remove an apparent empowerment of the Commission to promulgate a trade regulation rule upon "any . . . information which the Commission considers relevant to such rule." (15 U.S.C. § 57a(e)(1)(B) and § 57a(e)(3).)

The possible additions to the FTCA which we strongly oppose are 1) to give the Commission's cease and desist orders final effect before judicial review (e.g., S. 1078, § 7 (a), 99th Congr., 1st Sess.), and 2) to authorize state attorneys general to bring actions in federal district courts for alleged violations of the FTCA (e.g., S. 1313, 99th Congr. 1st Sess.)

Our positions concern themselves only with impacts upon the content of commercial advertising. They do not address broader or other applications of the FTCA; they are consonant with First Amendment doctrine as announced by the Supreme Court; and they will correct terms in the FTCA which, by their vagueness, leave room for confusion in some lower courts as to proper adherence to the Supreme Court's instructions, or which even baldly contravene the First Amendment's guarantee of free speech. Such faults lead to unnecessary litigation and to unjust results, for, as we all know, not every case can go all the way to the Supreme Court for ultimate correction. Small and medium-sized companies, lacking resources to defend themselves adequately, are most prone to the injustice.

Sections 5(a)(1) and 5(a)(2) of the FTCA, the essential empowering provisions for the Commission, authorize it to take injunctive and other action against "unfair or deceptive acts or practices in or affecting commerce". We are interested only in the sections' application to the content of commercial advertising. Our statement, and its proposals regarding the FTCA, are limited to that narrowly focused area.

I. Unfairness.

The word "unfair" is amorphous, unbordered. It can mean whatever any given individual's value judgment might assign to it at any point of time. As a standard of legality it leaves to the subjective predilections of possibly three, or even on occasion only two, Federal Trade Commissioners to censor whatever commercial advertising they personally deem offensive ("unfair").

In a nation that prides itself upon a representative form of government, it is intolerable that five people, unelected, and with terms of office longer than those of a Congressman, Senator or President, or even three such people, or even two (out of a quorum of three) should have the power to impose as the law of the land, their personal, subjective, ideological views as to what is "fair". That is more power than your Committee has, or the entire Congress, or the President.

So broad a power to legislate belongs properly to the Congress with the President; both chosen by the electorate, as Federal Trade Commissioners are not.

Our particular area of concern in that regard is with the freedom of our members' commercial speech—their ability, indeed their constitutional right, to advertise as free of idealogical bureaucratic restriction and chill as the First Amendment guaranties.

Substantiality of that concern is confirmed by its recognition and articulation in Report No. 97-451 of the Senate Committee on Commerce, Science, and Transportation on S. 2499, 97th. Congr., 2d Sess., pages 2-3, (May 28, 1982).

In addition to problems with the scope of the Commission's unfairness authority, the Committee has been concerned with the use of unfairness to regulate commercial advertising. Traditionally, both before and after the Wheeler-Lea Amendment of 1938, the Commission has regulated commercial advertising only to prevent deception. In its staff report on "Television Advertising to Children" (February 1978) however, the Commission contemplated regulation of some children's advertising, not because it deceived children, but because it was "unfair"

Concerned with the potentially unbounded regulation of non-deceptive commercial advertising on the basis of unfairness, Congress addressed this issue in two ways in section 11 of the FTC Improvements Act of 1980. First, the Commission's authority to issue a children's advertising rule based on unfairness was removed. (After conducting an evaluation of the basis for a children's advertising rule on a deception theory, the Commission terminated the children's advertising proceeding in 1981.)

Second, Congress placed a 3-year moratorium on the Commission's use of unfairness in new section 18 rulemakings designed to regulate commercial advertising. This moratorium on new rulemaking permitted the Commission to continue to regulate commercial advertising on the basis of deception, and the Commission retained the authority to rely on unfairness in individual cases against advertisers under section 5 of the FTC Act. However, because the unfairness standard for the regulation of commercial advertising practices goes beyond the elimination of misleading or deceptive commercial speech, it presents a conflict with First Amendment principles. Section 14 of S. 2499, which prohibits the Commission from relying on unfairness to regulate advertising under both section 5 and section 18, is motivated by the Committee's continued concern with the potential for abuse in this area.

What might seem called for is that Congress fulfill its legislative responsibility by putting definitional perimeters around the word "unfair". However, we believe that no definition can be articulated which competently substitutes objective criteria for personal biases; or which would adequately codify for operational guidance of the Commission the limited constitutional exemptions from First Amendment protection (infra page 11) without so befogging the meaning of "unfair" that the word might just as well be bodily removed from the statute.

We appreciate the effort the House made to devise such a definition in H.R. 2970, 98th Congr., 1st Sess., § 2(a):

An act or practice in or affecting commerce shall be considered to be an unfair act or practice under subparagraph (A) if—

(i) such act or practice causes or is likely to cause substantial injury to consumers; and

(ii) such substantial injury (I) is not reasonably avoidable by consumers; and (II) is not outweighed by countervailing benefits to consumers or to competition which result from such act or practice.

Any determination under the preceding sentence regarding whether an act or practice is an unfair act or practice shall take into account, in addition to other relevant factors, whether such act or practice violates any public policy as established by Federal or State statutes, common law, practices in business or industry or otherwise.

Most respectfully, though, we must point out that this just serves to illustrate the difficulties in legislatively attempting to set objective prescriptions. For example, determinations in given instances of what is "injury to consumers" and whether it is "substantial", whether it can "reasonably" be "avoided" by them, or whether the act or practice is devoid of "offsetting benefits" of whatever nature, are all such subjectively laden value judgments that they would leave the Commission (or, more accurately, a majority of two unelected commissioners in a quorum of three) with no less uncontrollable discretion than it possesses now under the amorphous and unrestraining term "unfair".

We propose an amendment of the FTCA that simply and forthrightly states that the words "unfair . . . acts or practices in commerce" are not applicable to the content of commercial advertising.

We do not, as some have mistakenly argued, seek special immunity for advertisers from the Commission's unfairness jurisdiction; only as to the content of commercial speech. Any other act or practice by an advertiser, even relating to advertising but not involving its content, would remain subject to the same strictures as for any other enterprise.

Our democracy and our marketplace are grounded upon the conviction that wise decisions are most likely to be made when a broad range of information is disseminated. The First Amendment thus stands to protect the free flow of information. Communication does not take place without a receiver as well as a sender, so the right of all to speak freely implies an equal right on the part of the public to hear those who would speak. Indeed, the freedom to learn, to be fully informed on matters of interest, is as precious an inheritance as the freedom to tell.

Therefore, the guarantees of the First Amendment reach beyond speakers to encompass, as well, the recipients of communications. As the Supreme Court summarized in a case that invalidated as unconstitutional a Virginia statute prohibiting the advertising of prices of prescription drugs, "If there is a right to advertise, there is a reciprocal right to receive the advertising". Virginia State Board of Pharmacy *v.*

Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976). "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." Idem at pace 763. See Red Lion Broadcasting Company *v.* FCC, 395 U.S. 367, 390 (1969); Stanley *v.* Georgia, 394 U.S. 557, 564 (1969); Martin *v.* Struthers, 319 U.S. 141, 149 (1943).

While the persuasive aspect of commercial advertising may be of particular value to sellers of goods or services, the informational content is no less significant to consumers, whose knowledge of product availability and kind would be restricted in the absence of advertising. The Supreme Court's decisions involving corporations which have undertaken to communicate with a segment of the public are appropriately based "not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." First National Bank of Boston *v.* Bellotti, 435 U.S. 765, 783 (1978) (footnote omitted) (citing cases).

We submit that under constitutional principles commercial speech—advertising—cannot be restricted or proscribed unless a court [2] determines 1) that it is deceptive, or 2) that the restriction directly serves a substantial governmental interest and the restriction does not exceed what is necessary to serve that interest. As the Supreme Court has explained in the context of advertising for professional services.

> Commercial speech doctrine . . . may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising may be prohibited entirely. * * * Even when a communication is not misleading, the state retains some authority to regulate. But the state must assert a substantial interest and the interference with speech must be in proportion to the interest served. Central Hudson Gas Co. *v.* Public Service Comm'n, 447 U.S., at 563-564. Restrictions must be narrowly drawn, and the state lawfully may regulate only to the extent regulation furthers the state's substantial interest. In the Matter of R.M.J., 455 U.S. 191, at 203 (1982) (footnote omitted).

Above all, and this is our overriding interest, non-deceptive advertising is not to be censored because of bureaucratic idealogies as to what is "fair" or "unfair". The Commission simply should not have the power to abridge truthful, non-misleading commercial speech as "unfair".

If advertising is to continue to play its vital role in our economy it must be protected from unjustified restraints.

Truth and accuracy are concepts which advertisers can and should live with. On the other hand, advertising cannot live with an amorphous and ever-changing concept of "unfair[less]". The characterization is no standard; like beauty, it varies with the eye of the beholder.[3]

While this Committee is well aware of the abuses heaped upon advertising by the Commission in the 1970's, we would like to bring a few examples to its especial attention. The most obvious is the Children's Television rulemaking effort, which was brought to an end as the result of congressional action. In the words of the past Chairman of the Commission, that rulemaking proceeding was premised on the concept that "children's advertising is inherently unfair". The remedies which the Commission would have imposed to correct this alleged unfairness would have, among other things, banned all television advertising of all products to young children (probably under age 8) and would have banned the advertising of sugared products to older children (probably under age 13). If that rule had gone into effect, it would have been unlawful to advertise baseball gloves, toys, cereal or any other product on, at least, Saturday morning television. Presumably one could not have advertised candy on any television program in which children made up a sizable percentage of the audience.

Several other trade regulation rulemaking proceedings involved application of the unfairness doctrine to advertising. One of these proceedings, initiated November 11, 1975 (40 Fed. Reg. 52631), proposed a rule that would have made it unlawful to make an advertising claim for any over-the-counter drug which the Commissioner of Food and Drugs had determined could not be made, or in language that could not be used,

in labeling the drug. If that rule had issued, it could have become "unlawful" to truthfully advertise an effective analgesic, for example aspirin, as useful for backache, muscular aches and pains, menstrual pains or pains following tooth extraction if the FDA-mandated label stated only that the product was good for headaches, occasional minor aches and pains and reduction of fever. The easily understood term "cough remedy" could not have been used; only the elitist term "antitussive". Truthful advertising, completely devoid of deception, would have been suppressed.

We could point out other examples of abuses such as the Food Advertising rulemaking procedure which was, in part, based upon unfairness. However, to do so would merely burden the record, for it seems unlikely that any reasonable person would dispute the fact that past Commissions have used the unfairness doctrine in an abusive fashion. Barring amendment of the FTCA, it could do so again; and it is no secret that pressures are brought upon FTC even in these days by groups that would like to see their pet ideologies transformed into trade regulation rules.

Neither can it be disputed that the Commission has viewed "unfairness" as a license to censor truthful advertising based upon the Commission's economic or other ideologic biases. One quick example:

In its Statement of Basis and Purpose for its Vocational and Home Study Schools Trade Regulation Rule, 43 Fed. Reg. 60796, at 60805 (1978), it pronounced:

It is a basic tenet of our economic system that information in the hands of consumers facilitates rational purchase decisions; and, moreover, is an absolute necessity for efficient functioning of the economy. If consumers have access to good information on the facts significant to their purchase decisions, then the normal forces of the market are likely to induce sellers to improve those characteristics of the product or service that are most important to the consumer.

In other words, non-deceptive advertising can be censored as "unfair" for failure to set forth such "information" as the Commission might deem "facilitat[ive]" of what the Commission views as "rational purchase decisions" and necessary "for efficient functioning of the economy"!

Why does the advertising community feel that it is necessary to propose that Congress ban FTC's resort to the unfairness doctrine across the board for advertising content; i.e., in both rulemaking and adjudications? The short answer is that any act or practice the Commission could regulate in rulemaking (the Senate Commerce Committee, in the last session, did perceive the impropriety of an unfairness standard for trade regulation rulemaking) it can undertake to regulate just as improperly in case-by-case adjudications. If unfairness remains as a standard for advertising adjudications, a future Commission can decide to bring individual cases against advertisers based on the same unfairness theories which produced the aborted over-the-counter drugs, children's television advertising, and food advertising rulemaking procedures.

The threat of a possible unfairness charge operates as an effectively chilling, prior restraint on incentiveness and innovation in advertising. Advertising is an art form; it must motivate and persuade or its cost constitutes an economic waste. It must have freedom to do its legitimate job.

The Committee should think also of the economic costs which the Commission's pursuit of the unfairness doctrine imposes upon advertisers, and thus on the consuming public. It is wrong to assume that no harm is done if the FTC goes off on an unfairness escapade but subsequently decides to abort the effort. Someone has to pay for that exercise, and in the final analysis it is the taxpayer and the consumer, often to the tune of millions of dollars.

Recommendation re " . . unfair . . . acts or practices . . .": We urge that the FTCA be amended by adding at the end of present section 5(a)(2) a sentence reading, "The Commission shall have no authority under this section or section 18 to prohibit or otherwise regulate the content of any commercial advertising on the basis of a determination by the Commission that such commercial advertising constitutes an unfair act or practice in commerce."

II. Judicial review.

Constitutional principles mandate that commercial speech—advertising—cannot be censored unless 1) it is deceptive, or 2) the abridgment directly serves a substantial state interest and does not exceed what is necessary to do so. Matter of R.M.J., supra page 11.

Only a full judicial determination is acceptable to find that such essential criteria exist.

When constitutional rights turn on the resolution of a factual dispute we are duty bound to make an independent examination of the evidence in the record. [Citations.] Brookhart v. Janis, 384 U.S. 1 at page 4 n.4 (1966).

This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." Speiser v. Randall, 357 U.S. 513, 525, 78 S. Ct. 1332, 1342, 2 L. Ed.2d 1460. In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see * * * whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." [Citations.] We must "make an independent examination of the whole record," Edwards v. South Carolina, 372 U.S. 229, 235, 83 S. Ct. 680, 683, 9 L. Ed. 2d 697, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression. New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964).

In Nat'l Association of Letter Carriers v. Austin, 418 U.S. 264 (1974) the Court unhesitatingly applied the same doctrine to non-press speech by referentially transposing it bodily to a union's listing of allegedly unfair employers. Idem at page 282.

Blount v. Rizzi, 400 U.S. 410 (1971) held unconstitutional a statute (39 U.S.C. § 4007) that permitted a district court to temporarily detain allegedly obscene incoming mail pending determination of that issue in a Post Office administrative hearing (under 39 U.S.C. § 4006), notwithstanding that the court would be required to find probable cause that the § 4006 hearing would succeed in proving obscenity. The Supreme Court held that even that degree of judicial intervention was not enough to meet First Amendment requirements.

[T]he First Amendment requires that procedures be incorporated which "ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity [read: "deception"] only by a dim and uncertain line * * * "[citation]. Since we have recognized that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated * * * is finely drawn * * * [t]he separation of legitimate from illegitimate speech calls for * * * sensitive tools." [Citation.] Idem at 410 U.S. 416-17.

"The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedurerequiring a judicial determination suffices to impose a valid finalrestraint." [Freedman v. Maryland.] 380 U.S. at 58-60. Idem at 410 U.S. 418.

["]Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression. * * * " [Freedman v. Maryland.] 380 U.S. at 57-58. Idem at 410 U.S. 419.

At present, courts feel themselves virtually precluded from questioning a Commission decision that an advertisement has an undefined quality described as "capacity to deceive" the public. In the words of one court, "The meaning of an advertisement to the public and whether it is calculated to deceive is a question of fact, and the Commission's conclusions with reference thereto may not be disturbed unless arbitrary or clearly wrong." Gulf Oil Corp. v. FTC, 150 F.2d 106, 108 (5th Cir. 1945). Such a simplistic rule has resulted in orders restricting advertising representations where there had been no showing that even unthinking, ignorant, or highly credulous consumers could have been misled. E.g., FTC v. Mary Carter Paint Company, 382 U.S. 46 (1965); FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965); Spiegel Inc. v. FTC, 494 F.2d 59 (7th Cir.), cert. denied, 419 U.S. 896 (1974); Prima Products, Inc. v. FTC, 209 F.2d 405 (2d Cir. 1954); Gelb v. FTC, 144 F.2d 580 (2d Cir. 1944).

The constitutionally governing evidentiary standard for abridging commercial speech is a record which a court finds meets First Amendment requirements with "convincing clarity" Bose Corporation v. Consumers Union of United States, Inc., 104 S. Ct. 1949, 1965, 1967 (1984). Although the fact at issue in Bose was malice of the defendant in a case for libel, the principle was the caliber of evidence necessary to support an exemption from First Amendment protection.

The burden of proof is firmly on the proponents of abridging or hobbling laws. "The party seeking to uphold a restriction on commercial speech carries the burden of proving it." Bolger v. Youngs Drug Products Corp., 103 S. Ct. 2875 at 2882 n.20 (1983) (citing Central Hudson, 557 U.S. at 570). "Because appellant's statements regarding the Dalkon Shield were not false or deceptive, our decisions impose on the State the burden of establishing that prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial governmental interest." Zauderer v. Office of Disciplinary Counsel, 105 S.Ct. 2265, at 2277 (1985))

One need only read the Supreme Court's fine-toothed combing of the evidence, and consequent rejection of the government's abridgment of Youngs' advertising, to appreciate how heavy that burden of proof is. It cannot stand upon the present statutory confinement of judicial review to merely searching a record for something by way of substantial evidence to support a Commission decision.

Highly critical in this respect is the virtual obeisance courts have felt they must make to the Commission's assumed expertise in deciding what meaning to attribute to an advertisement as a crucial premise for finding it deceptive or misleading. With such an ability to set up strawman constructions, the Commission has had virtually unlimited freedom to charge across "the line between speech unconditionally guaranteed" (i.e., truthful speech) "and speech which may legitimately be regulated" (i.e., deceptive or misleading speech), supra. Courts have felt equally inhibited from acting upon disagreement with other factual findings by the Commission.

The egregious examples referred to in the Muris memorandum attached to the Commission's then Chairman Miller's Separate Statement (Transcript of hearings before the Subcommittee on Commerce, Transportation, and Tourism of the Committee on Energy and Commerce of the United States House of Representatives, 97th Congr., Second Sess. (April 1, 1982), pages 37-39), and a host of others that could be added,[4] dramatize the propensity and ability of the censor to pursue its business of censoring with frightening zest.[5] This is a ripe time for Congress to clarify a legislative intent that the Commission must conscientiously hold to the letter and the spirit of the recently developed recognition that commercial advertising does come under the wing of the First Amendment.

Recommendation re judicial review: We propose that the fourth sentence of FTC Act § 5(c) be amended to read, "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive except for findings relating to the content of a commercial advertisement which, if supported by evidence of convincing clarity, shall be conclusive."

III. Trade Regulation Rulemaking

The rulemaking safeguards of the Magnuson-Moss Act were imposed to ensure that the affected industry have an opportunity to defend itself. As the drafters of the procedural safeguards put it:

> Because of the potentially pervasive and deep effects of rules defining what constitutes unfair or deceptive acts or practices and the broad standards which are set by the words "unfair or deceptive acts or practices", the Committee believes greater procedural safeguards [than mere notice and comment] are necessary.[6]

However, under 15 U.S.C. § 57a(e)(1)(B) "[T]he term 'rulemaking record' means ... and any other information which the Commission considers relevant to such rule."

In other words, anything from hearsay to a ham sandwich.

And, under 15 U.S.C. § 57a(e)(3), for purposes of judicial review of such a rule "[t]he term 'evidence' ... means any matter in the rulemaking record." So that the Commission can put anything it wants to into the rulemaking record and then use it as a shield against reversal by the reviewing court.

Which hardly comports with First Amendment protection as expounded in the preceding section of this statement. Conformance with constitutional principles should be achieved by deleting the phrase "and any other information which the Commission considers relevant to such rule".

IV. Finality of Cease and Desist Orders.

A provision conferring finality upon an FTC order prior to full appellate review, such as appeared in section 7(a) of S. 1078, 99th Congr., 1st Sess., would, insofar as advertising is concerned, be a death sentence. Usually there would be no point to resuming a given campaign after its suspension during the time that passes pending appeals.

And, the section is probably unconstitutional under the authorities requiring even plenary judicial review before speech may be constitutionally abridged. Supra pages 16-21.

A provision for a possible stay of the Commission's order does not necessitate the magnitude of prior judicial intervention that the above authorities require.

An early finality provision is not essential to protect the public during the appellate process, for the Commission can, if it is able to supply the requisite constitutional showing to the court, obtain a stay of the advertising under the All Writs Act, 28 U.S.C. § 1651. F.T.C. v. Dean Foods Co., 384 U.S. 597 (1966).

Such a provision is, therefore, both unconstitutional and unnecessary.

V. Enforcement by State Attorneys General.

In Holloway, supra page 3, the Court of Appeals for the District of Columbia Circuit held that a private party could not assert rights under, or undertake to enforce, the FTCA. The reasons it gave are equally applicable, if not more so, for a bevy of state attorneys general.

They are that to allow such actions would vitiate the very essence of what Congress wanted by way of the Commission (infra). Of course, Congress can now change its mind, if it so wishes. But should it?

Said the court:

> The [FTCA] gives the Commission a broad range of flexible enforcement powers available for use, as deemed necessary in the FTC's sound discretion and expert judgment. Inherent in the exercise of this discretion is the interplay of numerous factors: the relative seriousness of the departure from accepted trade practices, its probable effect on the public welfare, the disruption to settled commercial relationships that enforcement proceedings would entail, whether action is to be taken against a single party or on an industry-wide basis, the form such action should take, the most appropriate remedy, the precedential value of the rule of law sought to be established, and a host of other considerations. Above all, there is need to weigh each action against the Commission's broad range policy goals and to determine its place in the overall enforcement program of the FTC.
>
> Private litigants [read: state attorneys general] are not subject to the same constraints. They may institute piecemeal lawsuits, reflecting disparate concerns and not a coordinated enforcement program. The consequence would burden not only the defendants selected but also the judicial system. It was to avoid such possibilities of lack of coherence that Congress focused on the FTC as an exclusive enforcement authority. (485 F.2d at pages 997-98, footnotes omitted.)

Should Congress now discard all that? Establish some 200 or more federal district division courts as mini-FTCs, "burden[ed]" with trying to crystallize nationally coherent laws regulating all unfair or deceptive acts or practices or unfair methods of competition in commerce, in the light of "the interplay of numerous factors" identified, in part, by the court, and "weigh[ing] each action against [a] broad range [of] policy goals and [determining] its place in [an] overall enforcement program?"

We submit the answer to all of that is obvious: No!

And, apart from all the above, franchising state attorneys general as enforcers of the FTCA is totally unnecessary.

As the Department of Justice points out in its letter of July 8, 1986 to the Honorable John C. Danforth (with which we agree), "Almost every state (49 states plus

the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands) has enacted legislation similar in purpose and scope to the [FTC] Act. Thus, the availability of the FTC Act to state attorneys general to initiate actions against fraudulent and deceptive practices within their state is unnecessarily duplicative."

Even where such unlawful practices may be launched from an outside state, jurisdiction over offenders can be secured via the long-arm statutes that are common across the country. Plus, such across-state practices will inevitably involve use of mail, wire or broadcast facilities, thereby arming the Department of Justice to attack them even by criminal prosecution under the mail and wire fraud statutes (18 U.S.C. §§ 1341 and 1343).

Finally, as recently as January 15th of this year, FTC announced a joint national enforcement initiative by it and state attorneys general against boiler-room operators who, doing business mostly by telephone, bilk consumers and businesses for huge sums of monies. FTC noted that this is not the first of such joint programs with state attorneys general, leading to prosecutions, and to a January 12, 1987 court action (*FTC v. Atlantex Associates*) against sellers of oil and gas drilling partnerships.

Clearly, where desirable, a coherent, national policy for enforcement profiting synergistically from the resources of state attorneys general in coordination with FTC is at hand, without the helter-skelter deluge of disorganized, disparate flood of heterogeneous cases that legislation such as S. 1313 would loose upon the federal judiciary. Again, we thank your Committee for giving serious consideration to the points we have made herein.

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[1] Three out of five Commissioners constitute a quorum, and two of those three, as a majority, can act for the Commission.

[2] See pages 16-21, *infra*.

[3] One commentator has noted, in regard to the "standards" set forth in a Commission's letter of December 17, 1980 to Senators Ford and Danforth, that "[i]n considering criteria for determining whether an act or practice is unfair, one difficulty with the current standards for defining "unfair" acts or practices is that they are based on a "value" rather than a "factual," foundation, with the result that the Commission, by applying its own values, has virtually unlimited discretion and may take actions that appear purely arbitrary. Derger, The Unfairness Standard and FTC Rulemaking: The Controversy Over the Scope of The Commission's Authority, 39 Antitrust Law Journal 53, 84 (Summer, 1980 Part I).

[4] E.g.: F.T.C. v. Mary Carter Paint Company, 382 U.S. 46 (1965); F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374 (1965); Prima Products, Inc. v. F.T.C., 209 F.2d 405 (1954); Gelb v. F.T.C., 144 F.2d 580 (1944).

[5] The absence of judicial reversal of such decisions for the constitutional reasons we are describing is due to the fact that at the time it was deemed that commercial advertising did not enjoy First Amendment protection. Valentine v. Chrestensen, 316 U.S. 52 (1942).

[6] H. Rep. No. 93-1107, 93rd Cong., 2d Sess., May 17, 1973, p. 45.

[7] We have already pointed out the difficulty of objectifying and operationalizing "unfairness". Supra pages 5-9. Imagine a multitude of federal district and appeals courts struggling to come up with a coherent national consensus on a case by case basis.

Senator GORE. Thank you very much. We appreciate your statement and your timing.

Professor Rice, you are invited to go next.

STATEMENT OF DAVID A. RICE, PROFESSOR, BOSTON UNIVERSITY AND RUTGERS-NEWARK SCHOOLS OF LAW

Mr. RICE. Thank you, Mr. Chairman.

I come here at the invitation of the Committee staff, not representing any association or anything else, and probably as one of the few law school academics who has taught advertising regulation for some period of time as a separate undertaking.

My first comments really do not go to the matter of substance. They go to the state of the reauthorization or the non-reauthorization. That is, I would join with Mr. Silbergeld and with other witnesses in saying it is time for a reauthorization of the Commission and, if necessary, to

separate out into other proceedings some of the issues that seem to be lingering. Many of these seem to go back to the late 1970s. It seems to me that we are living in the 1970s and not in the 1980s, and we are almost through the 1980s.

My specific comments go to several points. One is, the proposed exemption for commercial advertising from the unfairness jurisdiction of the Commission. My written statement explains more fully than I could present here the reasons why I think, first of all, the Constitution does not mandate an exemption for commercial advertising from unfairness regulation either in rulemaking or adjudication any more than it does for any other commercial speech over which the Commission has jurisdiction.

To say that is to say further that I do not believe that the Constitution, as the Court has interpreted it and set the standards in Central Hudson and applied them in other cases, exempts nondeceptive commercial speech from regulation. The Court has set standards. Particularly in the area where it can most affect commercial speech, it has fairly stringently applied those standards, and that is in the area of fairly strict scrutiny of remedies. That kind of scrutiny has occurred in Federal Trade Commission cases on appeal in the courts of appeal with particular emphasis on remedies.

The second point that I would make in relation to that is that I stated in my statement and elsewhere that, if I were an advertiser or in the advertising industry, the proposed standard that this Committee has incorporated in past bills that have been reported but not enacted would make me feel very uneasy. I am here, I suppose, because I have written in that area, have criticized the formulation rather extensively, and have offered in another publication an alternative to it that I think has the substance and content that would guide the conduct of people who are creating advertising and publishing it, as well as people who are selling from door to door.

I think the present standard, for reasons spelled out in my statement and are too much to go into now, simply is not a standard at all. It does not focus on either the type of conduct that is prohibited or the type of effect that would be prohibited. Nonetheless, my sense is that with precedent applied by the Commission and with review applied by the courts, a challenge to the standard even as incorporated in past legislation that has been proposed would survive constitutional challenge.

I simply believe that one of the downfalls in the record of the Commission in the 1980s, and late 1970s, is that they have not formulated a sound legal standard.

The second point relates to the question of whether or not there ought to be legislative standards for deception findings and legislated standards of judicial review. Again, I think it is fairly clear that the extent of commercial speech protection under the First Amendment is not that of strict scrutiny that exists in other areas of speech. It is also clear that, depending upon the mix of commercial and other speech, the Supreme Court has employed somewhat variable standards. The Bolger *v.* Youngs Drug case is one in which there was stricter scrutiny because

there was a public interest or public issue aspect that was involved along with commercial speech.

That is something that the courts are going to work out. They are in the process of working it out and I think it would be premature for this Committee and for Congress to legislate a standard while the court is really working out what is the scope of First Amendment protection and how is it going to be applied.

My last comment, at least for the moment, relates to the NAAG proposal. Although I can understand where it is coming from because there is a lot of disquiet among the attorneys general and others with the FTC activity or lack of it, I would concur with Mr. Weil and others, rather than with Mr. Silbergeld, that it would be bad policy for distribution of the authority to enforce the Federal Trade Commission Act to 50 State attorneys general on two grounds.

One is I think it would produce inconsistency and chaos. Second, the attorneys general already have a full plate and, to the extent the FTC is not enforcing in other areas, the plate is getting fuller.

I will conclude my remarks at that, and leave anything else for questioning or for examination of my statement. Thank you.

[The statement follows:]

STATEMENT OF DAVID A. RICE

Mr. Chairman and Members of the Committee, I am David A. Rice, Professor of Law at Boston University and Rutgers-Newark Law Schools. My appearance is at the invitation of the Committee. My remarks are based upon my longstanding attention to the Federal Trade Commission in teaching, research and writing on the subjects of consumer protection and advertising regulation. The views expressed are my own and represent neither Boston University, Rutgers University nor any client.

My testimony today initially addresses First Amendment arguments offered in support of imposing restrictions on FTC regulation. Thereafter, my comments briefly touch on other selected authority-limiting proposals before turning to broader observations about the directions and performance of the Commission. The particulars ought not, however, mask my main concern: that Congress move beyond the logjam of "corrective" proposals to the enactment of a reauthorization bill.

I. ADVERTISING AND THE FIRST AMENDMENT

Early in the 1970s, the Supreme Court brought purely commercial speech under the umbrella of the First Amendment protection. Later in the decade, the Children's Television Advertising and other Federal Trade Commission Rulemaking proceedings tested the limits of both the substantive scope of Section 5 and the remedial authority of the Commission. Those developments connect in proposals to exempt commercial advertising from FTC exercise of its authority to prohibit "unfair . . . acts or practices" and to legislate stricter standards of judicial review in deception cases.

A. The "unfairness" exemption

In 1980, the Commission published a policy statement that presented a reformulation of the meaning of the statutory prohibition against the use of "unfair . . . acts or practices". The Senate and House Committees have included the essential elements of that test in favorably reported reauthorization bills. This committee, unlike its House counterpart, also has recommended exemption of commercial advertising from rulemaking, but not adjudicative, applications of that test.

Neither limited nor full exemption is constitutionally mandated or indicated. Subsequent to its landmark decision in *Virginia Board of Pharmacy* v. *Virginia Citizens Consumers Council*, 425 U.S. 748 (1976), the Court made clear that the protection that it extended to commercial speech is limited.[1] Consistent therewith, the appeals courts, beginning with *Warner-Lambert* v. *FTC*, 562 F.2d 749 (D.C. Cir. 1979) uniformly have held that the First Amendment does not bar regulation of commercial advertising under Section 5. No court, however, has directly dealt with whether the First Amendment precludes FTC regulation of commercial speech, advertising or other, on unfairness grounds.

That question must be considered under the benchmark test of *Central Hudson Gas & Electric Co.* v. *Public Service Commission*, 447 U.S. 557 (1980). Under that test, speech that is misleading or proposes an illegal transaction is wholly unprotected. *Central Hudson*, 447 U.S. at 566. All other commercial speech enjoys "a limited form of First Amendment Protection". *Posadas de Puerto Rico Associates* v. *Tourism Company of Puerto Rico*, —— U.S. ——, 106 S. Ct. Rptr. 2968, 2976 (1986). The constitutionality of a restriction on the latter catagory of speech is determined under a three-part test: whether the government's interest in restricting the speech is substantial, the restriction directly advances the asserted interest and the restrictions are no more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566.

There is an interesting parallel in the jurisprudence of deception and unfairness under Section 5. Deception is recognized as a specie of unfairness.[2] That relationship underlies the Commission's analysis in its recent opinion in *International Harvester*, 104 F.T.C. 949 (1984). From a regulatory perspective, the approach is analogous to that of antitrust law; deception is a *per se* unlawful catagory of conduct that does not command the more searching scrutiny given to nondeceptive acts or practices that are alleged to violate Section 5. In the constitutional perspective, the dichotomy echoes that of *Central Hudson*.

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[1] *See e.g. Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 64-5 (1983) and *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 455-6 (1978).

[2] *See e.g.*, D. Rice, Toward a Theory and Legal Standard of Consumer Unfairness, 5 J. Law & Commerce 111, 120 (1985) and N. Averitt, The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act, 70 Georgetown L.J. 225, 265 (1981).

International Harvester, on its facts, teaches a further lesson. At issue was whether the failure to disclose a known fact in circumstances where the failure to disclose constituted what the Commission majority characterized as a "pure omission" was to be assessed under the deception test or the broader unfairness benefit-cost test. Regardless of which test was used, however, the case concerned hard information: the fact, known to International Harvester, that fuel geysering and a resulting risk of serious personal injury might occur when the fuel cap on a certain model tractor was removed after the engine had been running. The basic issue was whether the failure to disclose a specific fact violated Section 5.

In that respect, *International Harvester* is like most other FTC unfairness-based rulemaking and adjudication unfairness proceedings. The controversial "kid vid", or Children's Television Advertising, rulemaking that is stressed in the arguments made in support of the exemption was, in reality, a rare exception to the norm. Those who have analyzed and classified the 1970s unfairnesss rulemakings and adjudications found few that dealt with other than information disclosure.[3]

What the exemption targets, then, is primarily regulation based on a determination that a failure to disclose causes consumer injury of a kind that Section 5 exists to protect against. Past FTC actions based upon such a finding have implemented the policy expressed in *Virginia Board* and its progeny by requiring disclosure rather than prohibiting speech. While dictated by controlling judicial interpretations of Section 5, the approach effectively anticipated the *Central Hudson* mandate that restrictions on commercial speech must be tailored so as to be no more extensive than necessary.

Close scrutiny indicates, in summary, that most unfairness-based regulation shares with deception regulation a focus on information in the marketplace. Rather than, as exemption proponents frequently suggest, impeding the flow and depriving consumers of access to information, FTC unfairness-based rulings generally have enhanced the supply of material information. That serves, not conflicts with, the articulated purposes of extending limited First Amendment protection to commercial speech.

The issue therefore reduces to whether Congress should create a commercial advertising exemption on legislative policy rather than constitutional grounds. While I admire the First Amendment sensitivity shown in recent Senate Commerce Committee reports on FTC reauthorization bills, I am mindful that the Supreme Court demonstrated like concern in *Central Hudson* without finding it necessary to go so far as to make the regulation of nondeceptive advertising constitutionally impermissible.

Proceeding from that base, I contend that there is no basis for singling out commercial advertising from other commercial speech for special statutory protection. Creating such an exemption without convingingly strong justification also is unwise. Doing so would sow difficult and litigation-inviting classification problems that would unnecessarily increase the costs and diminish the effectiveness of law administration.[4] Knowing full well that locating the line that separates commercial advertising from other commercial speech would confound even marketing and advertising experts, every respondent would invoke and fully litigate its entitlement to the shelter of the statutory exemption. In the end, the only beneficiaries would be those who prevail, gain something from delay or represent clients in FTC proceedings. It would not be the public that finances the operation of the FTC and is the intended beneficiary of its activities that gains.

That said, I would want the exemption if I was an advertiser or in the advertising industry. My reasons are more fully developed later in my statement and in my writings. At this point, it will suffice to state that the "unfairness" test adopted by the FTC and favorably reported by the Senate and House Committees in prior years would make me very uneasy and inclined to argue that it trenched on protected First Amendment interests.[5] But that would be equally true if I was doing business

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[3] *See* D. Rice, *supra* note 2 at 120; M. Denger, the Unfairness Standard and FTC Rulemaking: The Controversy Over the Scope of the Commission's Authority, 49 Antitrust L.J. 53, 57 (1981); R. Craswell, The Identification of Unfair Acts or Practices by the Federal Trade Commission, 1981 Wisc. L. Rev. 107.

[4] *See* D. Rice, *supra* note 2 at 146–7.

[5] My first consumer unfairness article in fact poses, but does not resolve, the issue of whether regulation of commercial speech, not just commercial advertising, under the unfairness test adopted by the Commission and incorporated in recent Senate and House bills would pass First Amendment muster. *See* D. Rice, Consumer Unfairness at the FTC: Misadventures in Law and Economics, 52 Geo. Wash. L. Rev. 1, 65 (1983). The same text asserts, however, that regulation under a properly defined test would survive. *Id.* at 65–6. *See also* D. Rice, *supra* note 2 at 141–8 for a more extended analysis.

door-to-door. The new test is as open-ended and lacking in guidance as the widely criticized tests used by the Commission in the 1970s. That advertiser and advertising groups are aware of that fact and wary of its implications is abundantly clear from reading testimony and statements of their representatives in the record of prior reauthorization hearings.

B. Tightening standards of review in deception cases

A second, and more recently advanced, proposal suggests that Congress amend the Federal Trade Commission Act to direct the courts to more closely review any Commission determination that an act or practice is deceptive. The proffered rationale is that the long-standing principles of judicial review that require the courts to give great deference to agency expertise and findings of fact are at odds with the stricter scrutiny of fact findings that the First Amendment requires.

The proposal is without merit. At best, it is premature. At worst, it is misconceived. In any event, it is not essential. The Supreme Court and other federal courts are engaged in a continuing process of working out the scope of First Amendment of commercial speech. it is clear thus far that proof of actual deception is not required to support regulation on the ground that speech in question is misleading.[6] The degree of potentiality or probability of deception that must be shown to sustain a restriction under the first level *Central Hudson* test is not absolutely clear. It is, however, apparent in the Court's recognition of differences between commercial and other protected speech and its observation about the hardiness of commercial speech that strict First Amendment scrutiny of deception findings of fact is not intended.[7]

The proposal, in that light, both prematurely anticipates what is yet to be worked out by the courts as a matter of constitutional law and in so doing so overstates the extent of protection that has been extended. Most important, perhaps of protection that has been extended. Most important, perhaps, is that it fails to recognize that the Court's "hardiness" characterization and its refusal to apply traditional overbreadth and prior restraint principles to commercial speech indicates that the model of strict scrutiny does not apply with respect to purely commercial speech.

Such a standard would be particularly inappropriate with respect to the FTC. Strict scrutiny with respect to speech regulation reflects concern about restrictions imposed by agencies of government that, because of their mission, tend to be insensitive to and lack experience in dealing with freedom of speech values. The Commission, in contrast, has extensive experience in the area and has demonstrated that it perceives its mission as promoting the flow of information rather then simply regulating the quality of that flow. That is not merely consistent with, but the essence of, the *Virginia Board* charter.

Finally, it bears note that the courts have not in fact given the Commission an open field. They do continue to give difference to FTC findings when called upon to review determinations of fact, but whether such deference will be given in District Court actions initiated by the FTC is not yet clear.[8] More generally, the courts have not been hesitant to review and modify FTC orders with respect to remedies contained therein on First Amendment grounds.[9] Deference to basic findings coupled with stricter scrutiny of restrictions embodied in remedies is consistent with *Central Hudson* and the premises upon which the Court distinguishes commercial from other more fully protected speech.

II. OTHER PROPOSALS

Several other matters warrant brief comment. First, I am pleased that during the last round of hearings representatives of most of the professions went on record as abandoning the quest for some form of exemption from FTC jurisdiction. That reflects, in broadest terms, my view that beginning with *Parker* v. *Brown*, 317 U.S. 341 (1943) through the recent decision in *Southern Motor Carriers Conference* v. *United States*, —— U.S. ——, 105 U.S. 1721 (1985) the Supreme Court has sought to carefully balance the competing federal interest in promoting competition and states' interests in regulating particular activities. Unless there is another affirmative and

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[6] *See e.g. Friedman* v. *Rogers*, 440 U.S. 1 (1979) and *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. ——, 105 S. Ct. 2265 (1985).

[7] *See Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. ——, 105 S. Ct. Rptr 2265, 2283 (1986). *See Also F.T.C.* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41 (D.C. Cir. 1986).

[8] *See F.T.C.* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 40, n.1 (D.C. Cir. 1986).

[9] *See e.g. Warner-Lambert Co.* v. *F.T.C.*, 562 F.2d 749 (D.C. Cir, 1977), cert, denied 435 U.S. 950 (1978) (statutory and constitutional limits); *Beneficial Corp.* v. *F.T.C.*, 542 F.2d 611 (3d Cir. 1976), cert. denied 430 U.S. 982 (1977); *FTC.* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 44-5 (D.C. Cir. 1986).

strong federal policy interest to be advanced by creating a professional or other exemption, my predisposition is to impose a very high burden of persuasion on those who propose that one is necessary or warranted.

My second brief comment goes to the proposal to codify the *United States* v. *Brasuell, Inc.*, 1981-82 Trade Cases 64,325 (N.D.Ga. 1981) gloss on Section 5(m)(1)(B) if not repeal the section. Even codification is unnecessary and may be ill-advised. The *Brasuell* precedent exists and likely will be followed because it is a thoughtful, reasoned decision. If it is not followed and a conflict emerges among the circuits, the constitutional dimensions of the issues will beg Supreme Court review. The point is not that Congress is ill-positioned to reshape Section 5(m)(1)(B). It is that differences that do emerge in judicial decisions most likely will reflect difficult-to-anticipate variations in cases that only particular matters tend to frame. For now, at least, it seems best to leave things to that process.

III. DIRECTIONS AND PERFORMANCE OF THE FTC

Much of what I set forth in Part I of my statement rested on criticisms of recent developments at Sixth and Pennsylvania. I will return to some of those points, but only after noting some positive observations.

While I and other academics have criticized the content of the "unfairness" and "deception" reformulations, I do commend the effort to pause, reflect and clarify standards and rules. Further, and with concern about the "go slow" message that may be implict in provisions contained in recently proposed for inclusion in reauthorization bills,[10] salute FTC efforts to directly influence state decisionmakers in particular to eliminate constitutionally questionable restrictions on everything from professional to automobile dealer advertising and to abdure regulations that provide opportunities to establish competitive restraints. Drawing upon the expertise resident within the FTC to address those matters produces substantial and widely distributed benefits at a relatively low cost. It is a laudable enterprise that I hope will be continued and encouraged.

Although I applaud the effort to reflect upon and clarify substantive doctrine, I am very troubled by the outcome of that process. As to the "unfairness" test, I have published both a critique of and a proposed alternative to the test announced in the 1980 Policy Statement and thereafter incorporated in Senate and House reauthorization bills.[11] Those views have been shared with this Committee in written communications submitted for the record in connection with some prior hearings.

Reduced to its essentials, my critique of the unfairness test developed in the 1980 Policy Statement and brought into FTC case law in *Horizon Corp.* 97 FTC 464 (1981) is that it is unresponsive to the Supreme Court directive in *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233 (1972) that the Commission articulate a true legal standard of consumer unfairness. Stating the test as a benefit-cost analysis without using terms that identify the types of conducts or effects that are prohibited manifests a lack of appreciation for the fact that a legal standard should address private and public decisionmakers in a manner that aids them in identifying the conduct or effects that the law prohibits and makes it possible to ascertain the factors that are relevant to determining to lawfulness of particular conduct. Finally, the FTC test is internally inconsistent in terms of economic theory.

The occasion does not allow for spelling out each of those points. They are fully developed, however, in my article titled "Consumer Unfairness at the FTC: Misadventures in Law and Economics" which was published in 52 George Washington Law Review 1 (1983). My reprint supply is nigh exhausted, but I will arrange to supply copies to the Committee if requested.

There is, I concede, little prospect that "unfair" ever can be defined with the kind of precision that would satisfy commercial advertisinig exemption proponents and others concerned about the illusive meaning of the term. Undaunted, however, I undertook to frame a "consumer unfairness." Instead of trying to present an idea of what I thought the statutory test should mean, I started with thinking about the nature and functions of a legal standard. Applying that to the specific statute produced a standard that defines "unfair . . . acts or practices" as those which: "(1) deceive consumers or deprive them of information material to the exercise of consumer choice; (2) take advantage of the inability or limited ability of a significant class of consumers to make informed or reasoned judgments; or (3) interface in a

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[10] *E.g.* H.R. 2385, sec. 9, 99th Cong., 1st Sess. (Intervention by Commission in Certain Proceedings).

[11] *See* D. Rice, *supra* notes 2 and 5.

material respect with the ability of consumers to rationally exercise informed choice.[12]

It would be too much to claim that I am positive that I got it exactly right. Testing analysis and discourse is required before that can be asserted. On the other hand, I am confident that the formulation better serves the function of guiding the decisions of those who must comply with and those who must apply the "unfair . . . acts or practices" prohibition. Indeed, I have the temerity to claim that, even though I do not use the magic words, the content of market regulation, my approach is more consistent with that economic model that assertedly undergirds the FTC test and more properly leads to the use of benefit-cost analysis in the choice of remedy rather than inaptly applying it in a free-floating manner in determining the legality of conduct.

With respect to the "deception" test, I share with former Commissioners Bailey and Pertschuk the concern that the reformulation fixed something that wasn't broken, is at odds with precedent, unsettled the law by creating new questions of application and leave those who are most vulnerable without adequate Section 5 protection. [cite] The latter concern is underscored by the fact that, after vigorously defending the the new "deception" test in congressional hearings as being simply a clarifying restatement of existing law, the FTC strategically and successfully argued to the appeals court in *Southwest Sunsites* v. *FTC*, 785 F.2d 1431, 1435-6 (9th Cir. 1986) that the test is narrower than and subsumed within its long-standing predecessor.

Basing such change in the first instance on an analysis that invited the perception that the Commission had generally applied the "wayfaring fools" test and critically presented a few well-selected cases as typical fare was, in my view, unsound policymaking. Further, adapting the common law model of deception of FTC decisionmaking neglected the fact that the courts have significantly reshaped some of the principles on which the new deception test was based. In addition, patterning on common law principles showed a lack of understanding that its tighter rules reflect the fact that common law is remedial. Its principles determine ex postwhich of two parties should bear an economic loss. Section 5, on the other hand, operates ex ante It is directed toward the prevention of harm to the public. That fundamental difference that is well-recognized as justifying the taking of a less particularistic view of market conduct.[13]

Those comments prompt a few final observations. Specifically, the manner in which other policies have been formulated and announced troubles me. The important decision in *International Harvester* provides a notable example. The Commission therein propounded the relationship between deception and unfairness in what was essentially a moot case that it had refused to dismiss on the ground of mootness. The consequence was that important principles were announced in a procedural context in which (1) there was no opportunity for presentation of other views and (2) interpretation of the statute was insulated from judicial review. That is not insignificant. The decision established principles that will govern other conduct and cases. Its untested reasoning, however, at least arguably further narrowed the "deception" test and, in any event, rested upon what I, as someone who has taught and written about sales warranty law for many years, believe may have been a fundamental misapprehension about the content and rationale of that body of law.

My view of the choice to use *Cliffdale Associates*, 103 F.T.C. 110 (1984) as a vehicle for adopting the new "deception" test in the course of reviewing the Initial Decision based upon the old test is no less critical. Like the early 1970s *Pfizer* [81 F.T.C. 23 (1972)] case, *Cliffdale* and *International Harvester* were exercises in "back-door" policymaking. The prospective significance of such exercises, and the practical importance of their virtual nonreviewability, it amply demonstrated by the subsequent role of the *Pfizer* doctrine. It is not, in summary, a criticism that is targetd at the present Commission nor one which is based on disagreement with the content of the announced policy. It is one that goes to the process employed.

IV. FINAL OBSERVATIONS

These hearings continue a long-running review and debate concerning the powers of the Federal Trade Commission under Section 5. Their roots are in the late 1960s and the 1970s. Much of this week's testimony, like that in hearings held in recent years, focuses on alleged excesses of the Commission and the need to limit or define

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[12] D. Rice, *supra* note 2 at 118, 151.

[13] *See Holloway* v. *Bristol-Myers Co.*, 485 F.2d 986 (D.C. Cir. 1973) (explaining why there is no private right of action implied under Section 5).

its authority. It is well to remember, however, that what occurred during the 1970s was a response to Congress and others prodding the Commission to become more active and aggressive in its administration of Section 5.

The lesson of the 1970s may be that the Commission, with substantial encouragement, went too far too fast in attempting to correct its course. What has occupied this Committee and others well into the mid-1980s, however, is an exorcism of the 1970s experience. It is, in many respects, a mirror image of what occurred in the late 1960s and early 1970s.

The time has come to stop using "kid vid" and other criticized ventures as justification for one upon another proposed limitation that clogs the real agenda: reauthorizing the FTC. It is time to look forward rather than back and hold this Commission accountable through oversight for its policies and programs rather than holding it hostage to the resolution of concerns that can be tied to past performance. Moving in that direction may have the incidential benefit of not repeating the 1970s mistake of over-correcting for perceived errors of a prior era.

Senator GORE. Thank you, very much. We certainly appreciate that statement. Again, I commend your full statement to those who read this record.

Mr. Weil, Professor Rice has a view that FTC unfairness-based rulings have generally enhanced the supply of material information. Do you agree?

Mr. WEIL. Some of their rulings and decisions have enhanced, but I do not think they have been unfairness-based. I think every one of them can be based on an anti-deceptive theory. You take the R rule, you take the Fabric Labeling, and so on, these are all means of avoiding deception by omission.

I do not know of anything the Commission has done, and certainly nothing that has been upheld in the courts, on a pure basis of unfairness alone.

Senator GORE. Do you want to respond, Professsor Rice?

Mr. RICE. Well, certainly one can argue that because Deception is simply a species of unfairness. It is a subcategory, something I thinks the Commission has made clear in its International Harvester decision. The borderline tends to be at whether there is a duty to disclose and whether the Commission will compel disclosure.

Most of the rulemakings that were initiated or completed by the Commission during the 1970s that had an unfairness theory to it included the unfairness theory basically because there was a question even under the pre-Cliffdale Deception standard and before International Harvester as to whether or not an anti-Deception theory would support requiring an affirmative disclosure of information. I think that was fairly clear from the analysis and the statement of basis and purpose in a number of the rulemakings.

Senator GORE. Mr. Weil, is it your position that the FTC's application of its unfairness authority to advertising is always unconstitutional? Or only when it violates the principles of the Central Hudson Gas case?

Mr. WEIL. Well, I think the argument could be made, Mr. Chairman, that it always violates the principles of the Central Hudson case for a very direct and fundamental reason. This does not mean that the advertising industry would necessarily oppose or contest or challenge in court on a constitutional basis an unfairness approach which has a proper definition, if one can be achieved. We do not think it can be. We do not think it ever has been, including the good Professor's.

But leaving that aside, and to answer your question directly, once you are past Deception, and of course if there is Deception there is no Central Hudson problem at all. The first hurdle is that there must be a substantial State or Governmental interest involved.

Now that means public policy. Our Constitution I think very clearly assigns the responsibility and the authority for determining our national public policy to the Congress, made up of elected officials, and then the President, also elected. I think that under the Constitution a determination of the national public policy, which under the broad term unfairness is essentially just that, cannot be conferred upon, cannot reside in, cannot be delegated to the Federal Trade Commission.

Senator GORE. Professor Rice, could you briefly comment?

Mr. RICE. Well, there are two comments I would make. The first is that, the Commission"s treatment in International Harvester of deception and the question of omission forces an awful lot of things into unfairness and the three criteria of Central Hudson.

The second is, it is very clear from the constitutional history and the rulings of the Supreme Court that Congress may delegate to an administrative agency the enforcement of a statute in which Congress states what the mission of the agency is and then leave enforcement to the agency subject to the Congress's oversight.

Mr. VERSFELT. Senator, might I just respond briefly to the professor?

Senator GORE. If you could supply that for the record, I want to give my—or perhaps we will have a chance to come back, but let me recognize—Do you want to get a brief one in before we go? I am going to stay here until Senator Breaux comes back.

Senator KASTEN. I am going to go and vote right now, and then come back.

Senator GORE. Fine.

Well, please follow up, then.

Mr. VERSFELT. Thank you, Senator.

I think of course I support and agree with the comments of Mr. Weil as to the unconstitutionality of the term unfairness when in the statute, but I think where I disagree with the Professor most strongly is whether this Committee's investigation of what a proper FTC Act should contain should be focused only on the constitutional limits.

It seems to me that there are very good reasons for not having unfairness as a standard in the statute even if the Professor is correct that it might be constitutional in certain circumstances—the vagueness of the authority, the difficulty the Commission has in determining what they ought to investigate and prosecute and what they should not; the chilling effect on advertisers and their agencies in putting out advertisements without knowing what might get them into trouble and what might not. There are very good practical arguments for not having unfairness, in addition to the constitutional problems.

Mr. WEIL. Might I just add to that, too, if you please, Mr. Chairman, the references to the International Harvester decision, it was not a decision that enforced anything. It was a refusal to decide. If it had been a decision to enforce any restraint upon International Harvester, it certainly was not challenged. So we cannot say where it would have gone.

What International Harvester did was to restate the Commission's views, or restate its definition of unfairness with which we quarrel, because we think it is a completely unsustainable definition.

Senator GORE. One other question. Advertising Age magazine has asked on its editorial pages for an FTC "active enough, vigilant enough to arrest a disturbing drift" toward State regulation of national advertising.

How, in your view, has the Commission"s cutback in enforcement helped to cause this trend? And what changes in the FTC are necessary to arrest it? If you could keep your responses brief, I would appreciate it.

Mr. Weil?

Mr. WEIL. Well, first of all, I do not think that the cutback has really accounted for that. Do not forget, there is a very effective self-regulatory program going on within the advertising industry. The first enforcement is that the national advertising division of the Council on Better Business Bureaus, which if it does not obtain from the advertiser a change that it thinks should be made, or a discontinuation of the advertising, is authorized to refer the matter to the Commission.

I am not aware that any matters have had to be referred to the Commission, so it has not been called upon to act. Now these State activities have been mostly on a local basis. It has not been regional advertising. It has not been national advertising. It has mostly been local—even though the local outlet, the local advertiser, may have been part of a larger chain such as the hotels that were referred to.

Mr. RICE. I would like to add a brief comment to that. I do not really perceive that the attorneys general have really gotten that much more active, but I do perceive that they believe that they do have to become more active because there are things that they are hearing about that they have refrained in the past from dealing with because they assumed that the FTC was to deal with the national or the regional matters.

Senator GORE. Very good. We are going to have to briefly take a recess. Senator Breaux is on his way back. He will start up the hearing again. He and Senator Kasten will conclude the hearing, if they finish their questions before I return.

So we will stand briefly in recess.

[Recess]

Senator BREAUX [presiding]: The Committee will please come to order. We apologize for the interruption. It is something that is beyond our control.

I would ask Mr. Kasten to proceed with any questions he may have at this time.

Senator KASTEN. Mr. Chairman, thank you very much.

Professor, you mentioned in your statement and again during questioning that the FTC promulgated rules regarding advertising based on unfairness. I did not understand exactly what you said, because you said in effect, well, it depends on if you look at unfairness as a part of the definition of deception.

But let me just specifically ask you: Could you give me a list of the specific rules that the Federal Trade Commission has promulgated based specifically on unfairness? How many rules are we actually talking about, and what are they?

Mr. RICE. I could not give you a full list at the moment, but I would readily supply that to the Committee in writing after the proceeding. But certainly the analysis in the R value rule had a substantial unfairness base at the margin of that rule.

Senator KASTEN. Was it based on unfairness?

Mr. RICE. It was based both on Deception and unfairness, but, in terms of some of the mandatory disclosure provisions, there was clearly an unfairness base. The Eyeglasses Rule had a very strong unfairness base in terms of the restraints, but not really on the information—not as much on the information disclosure.

Senator KASTEN. I am trying to get real specific. I mean, specifically on unfairness.

Mr. RICE. As I said——

Senator KASTEN. We have been wrestling with this for four years, and one of the difficulties is that frankly a number of us who have looked at this have not been able to find rules that are based specifically on unfairness I was just asking you to give, not ones that have an element of unfairness in them; but rather, are specifically based on unfairness.

Mr. RICE. I am afraid, Senator, I would have to refresh my recollection. But I did catalogue them. I do have a breakdown in my files. I did list them in one of the articles, and there is also a cross-listing that I could find from a couple of the other articles that people have published in the area, and I would be glad to provide that in writing. [See p. 123]

Senator KASTEN. Let me ask, if I could, Mr. Versfeld. Are there specific rules that are based on unfairness?

Mr. VERSFELT. Thank you, Senator. I will give as clear an answer as I can. We have searched the record. There is no rule that was promulgated and went to fruition based only on unfairness, not one have we found.

The Professor mentions the R Value Rule and the Eyeglasses Rule. They were based on Deception and unfairness. Now I am still a little confused whether the Professor thinks that because Deception is a distinct group or subset of unfairness that a rule based on Deception is therefore based on unfairness, but I can tell you in terms of the records in those rules, they were based on Deception, they were considered on Deception, and not one rule in the history of the FTC has been based on unfairness alone.

Senator KASTEN. Professor Rice?

Mr. RICE. I would agree with that. Not one has been based on unfairness alone. I think I made that point by saying that there were Deception bases; there also is an unfairness rationale because, at the margins, I think there was a recognition that some of the things could not be fully supported on a Deception theory. That is also true, incidentally, in the Holder in Due Course Rule with respect to some of the mandated disclosure requirements.

Senator KASTEN. Well, in your testimony you mentioned the International Harvester case, the one involving fuel geysering. Could that case have been brought if the FTC Act had included the Senate provision concerning rulemaking and commercial advertising? I refer to the Senate provision which we included last time which essentially had unfairness on a case-by-case base only, and deception on both a case-by-case and a rulemaking basis.

Mr. RICE. Well, clearly any of the cases that have been brought as adjudications, as opposed to rulemaking, that have unfairness as part of the theory could be brought under that amendment.

Senator KASTEN. Now let me just, if I can, push you a little bit, Professor. If I understand what you said with regard to the Central Hudson case, you believe, as I understand it, that the Federal Trade Commission's authority to regulate advertising essentially should be identical to the Supreme Court's ruling in Central Hudson. If that is the case, why do we even need to talk about unfair and deceptive advertising? Why do we not just write Central Hudson into the law, into the FTC Act? Is that what you are suggesting?

Mr. RICE. That is not what I am suggesting at all.

Senator KASTEN. Could you correct me on that?

Mr. RICE. I am saying that the FTC's regulation under the unfairness provision of the FTC is subject to the limitations set forth in Central Hudson in the same way that an Alcohol Beverage Commission's regulations are subject to those criteria, or that a Motor Vehicle Commission's regulations on automobile dealer advertising are subject to those restrictions. It is not that they are co-extensive.

It is saying if you use your authority, you must use it where there is a determination that there is a substantial interest, and in that sense you do have a determination by Congress that there is a substantial interest in regulating unfair advertising as well as other unfair acts or practices. Whether the regulation in a particular instance, whether it is rulemaking or adjudication, is going to further that interest is something that has to be determined on the record by the FTC.

Finally, whatever remedy that the FTC employs, if the FTC finds a violation, must be no more restrictive than necessary to accomplish the purpose of that proceeding. That is how Central Hudson applies.

Senator KASTEN. Mr. Versfelt, could you comment on the same question?

Mr. VERSFELT. I would like to, Senator. Thank you.

I think when the Professor says that Central Hudson applies to FTC proceedings in the area of advertising, he is stating a truism. The Constitution applies to us all. I do not think anyone disagrees with that.

Our position, and what we urge on the Committee in its oversight of the FTC reauthorization Act, is that apart from the constitutional limits and where they may stand, there are valid, practical reasons for not having so vague a standard as unfairness in a statute that is designed to carry out Congressional purposes through an independent agency in the application in an advertising area imbued with First Amendment overtones.

Senator KASTEN. So what we are saying is that Congress should be able to place limits on FTC authority to regulate advertising, and those limits may include the requirement that the Federal Trade Commission can only regulate unfairness or, in your case, unfairness and deception. Is that what you are saying, Professor?

Mr. RICE. Oh, I think not.

Senator KASTEN. I know this is a very narrow point——

Mr. RICE. No, no.

Senator KASTEN——but we have been wrestling with it, and in the past, this Committee, been able to get through this, if you will, by a compromise. Now there is a question as to whether that compromise may stand up or not, based in part on whether or not we are simply taking a court ruling, and some are trying to put it in the books, or we are trying to find a balance here with the definition of some words which are very difficult to define.

Mr. RICE. Senator, I take no exception to your point that Congress could make the choice to put limits on the Commission. I think that is the role of Congress, to determine what the Commission ought to be doing. I do take exception to the argument that the First Amendment is the basis for creating the exemption because I do not think the First Amendment compels it.

Second, with respect to the exercise of legislative policy choice, my written statement raises questions about whether or not an exemption ought to be focused on commercial advertising as opposed to other forms of commercial speech. I think that invites some incredibly difficult line-drawing problems for the Commission. From the point of view of administration, it invites litigation, delay, all kinds of other things.

So the question really ought to be: What is it we want them to regulate if you are thinking about the policy choice without trying to draw distinctions between categories of commercial speech.

Senator KASTEN. Mr. Chairman, my time has expired.

Senator BREAUX. Go ahead, Senator Kasten.

Senator KASTEN. I just have one final question, Professor.

Some of the opponents of the Senate provision on advertising and unfairness have argued that the provision is unnecessary because of the new FTC definition of "unfairness." In your article in the *George Washington Law Review* in November 1983, and in your statement today you suggested that the FTC's definition of unfairness increases, or could increase the likelihood of constitutional problems with regard to commercial speech.

Could you elaborate on that point for us, please?

Mr. RICE. Well, I do not think it increases it. I think that it invites the challenge, because the standard, as at least worked out in the protocol incorporated in past proposed legislation, is not, as Commissioner Calvani characterized it, a sound legal standard.

It is not really a legal standard at all, not in the sense that the Sperry & Hutchinson court asked the Commission to formulate. To that extent, it invites a challenge.

My comment a little bit earlier was that I think, given the background of precedent behind the statement, given the way the Commission might reason its application in a particular context, it is probably going to survive that challenge.

My point solely is——

Senator KASTEN. It invites a challenge, but you do not think the challenge would be sustained? Is that what you said?

Mr. RICE. I do not think the challenge is going to be sustained if the Commission is careful in its application of the test. My point is that, I think it is possible to have something that is a true legal standard that would not invite that challenge, or would not make it a credible challenge.

Senator KASTEN. So my characterization of your article saying that you suggested that the FTC's definition increases the likelihood of constitutional problems is not necessarily what you meant.

Mr. RICE. No. I do not think it increases it anything over what it was in the 1970s; put it that way. I am simply saying it leaves open the possibility. I think there is a better route to go in formulating it.

Senator KASTEN. You are saying that the challenge would not be sustained, if there even was a challenge, so it is a moot point.

Mr. RICE. If they develop the record carefully, I think that it probably would not be sustained. The point simply is it it unnecessarily invites a challenge. There is a different way to do it.

Senator KASTEN. Mr. Chairman, I have no further questions.

Senator BREAUX. I thank the Senator, and I thank the panel very much for their presentation. I am sorry for the interruptions. It has certainly not been a smoothly timed hearing, which is not the Chairman's fault, the Senator from Tennessee, or for any of us, or for any of the panel. It is just one of those situations.

As a new Member of this Committee, I am beginning to feel that we will be spending a great deal of our time trying to carve out what areas the FTC should not be involved in, whether it is in advertising, or whether it is in farm cooperatives, or whether it is in the insurance industry. We have spent a lot of time deciding why that industry should not be the subject of any FTC operations.

Let me ask Professor Rice, can you give me any examples of areas that you feel would be legitimately the subject of FTC rulemaking with regard to advertising that is now prohibited from being done because of the unfairness exemption?

Mr. RICE. I cannot give you a specific example right now. There are certainly——

Senator BREAUX. You see, the problem we have is that if someone is going to say, let us change this, I want someone to tell me why it should be changed; that this is not being addressed, or this is being done and nobody is paying attention to it. Is there some area out there in general that needs addressing that is not being addressed by the FTC because of the current law?

Mr. RICE. Well, the current law does not prohibit them certainly going case-by-case. It would be hard to identify the areas, because the FTC has not been going case by case either on much of anything.

Senator BREAUX. Well, what are those areas?

Mr. RICE. The point for me, and it makes my answer unresponsive to your question, is that I cannot give you an example of "I have seen this ad," or "this type of ad campaign" in the last week or the last month that I think the FTC should have jurisdiction over, and I am worried that they do not have it on unfairness grounds.

My basic point is, coming from the opposite side, I do not see a justification for exempting commercial advertising and not other commercial speech and I do not see a justification for eliminating the Commission's unfairness jurisdiction. The bottom line in that is that almost all the practices that the Commission deals with—not "almost all"—but a vast percentage of the practices they deal with involve speech of some sort. And to start line-drawing and then say, okay, we are going to come back and eliminate that power, seems to me to be unwise. But I cannot. I am sorry, give you a precise example that would satisfy your question.

Senator BREAUX. Well, just as a novice in this, if someone wants something changed, they are going to have to tell at least this Member why it should be changed. Because something must not be working right, if we want the FTC to get into this area which they now cannot get into because of the exemption.

What I am hearing from you is that we do not know any of those areas. They may exist, but they may not, and I cannot give you any examples.

Mr. RICE. Well, I guess maybe then I would go to the historical point that up until 1980 the Commission did have the power to go into those areas. The exemptions basically were a reaction against Kid Vid, the children's television advertising rule, which seems to be the justification for almost all of the proposals to either establish new restraints on the Commission or to continue restraints that were established in 1980.

I would like to return the Commission to what authority it had subject to some fine-tuning and some close oversight by Congress.

Senator BREAUX. Mr. Weil?

Mr. WEIL. May I just clear up two possible misimpressions? First of all, we are not, our Associations, are not advocating any distinction between advertising and other forms of commercial speech. It just happens that advertising is our province. That is what our Associations are about. We are not saying that other forms of commercial speech, non-advertising, should not have the same constitutional privilege that we are urging. It is simply up to somebody else to come up and defend them, some trade associations or body whose interests they are involved in. We are not.

Senator BREAUX. Is not your industry—I am sorry.

Mr. WEIL. The other thing is, and this we have asserted each year, but since this is your first year, Senator, let me make plain: We are not asking for an exemption of the advertising industry. There are many ac-

tivities of the advertising industry that theoretically could violate the Unfair provision of the Federal Trade Commission Act, and we are not addressing them.

For example, if advertising is used in an improper manner to create a monopoly. In Hawaii years ago a major baking company swamped Hawaii with advertising, far beyond anything that was justified on a commercial businesslike basis. They did it to wipe out competition, and that was held a violation of the Sherman Act.

Fine. We are not espousing any difference in that respect. We are addressing only one area of advertising, and that is "content," the subject matter of the advertisement itself, the advertising itself. Because that particular activity comes within the First Amendment; the others do not.

Senator BREAUX. Are you not vastly different in your regulation with regard to advertising that goes over the public airwaves as opposed to advertising that is simply printed in newspapers or brochures?

It seems that the FCC does consider a Fairness standard with regard to advertising in all material that goes over the public airwaves.

Mr. WEIL. There has been an historical change in that, Senator. Originally even the Supreme Court—no, the Supreme Court did not state it, but it just upheld a lower court decision that there is a common sense difference in the broadcast industry from the other media that use advertising.

However, that was based on the scarcity doctrine, coupled with the fact that broadcasters are enjoying a privilege conferred by the government, namely the license, and it is a very valuable privilege, and they can be expected to observe as a condition for that different rules, primarily dictated because of the scarcity doctrine. There are only so many airwaves that could be used to reach the public.

But recently now the FCC has said that it thinks the Fairness Doctrine is unconstitutional, but it considered that Congress has mandated it. It has just recently been decided by one court of appeals, I believe, that Congress did not mandate it and therefore the court of appeals remanded that issue to the FCC to redetermine, and then the court in the light of that analysis could take a look at it.

So even the Fairness Doctrine now may very well be held to be a violation of the First Amendment.

Senator BREAUX. Well, I know I am familiar with the case. They did remand it and kick it back to Congress, essentially.

We have another vote. I want to thank the panel. I think their testimony and discussion has been very helpful, and I know that we will be reviewing it very, very carefully, and I appreciate it. We may have some additional questions which we would be submitting, particularly for Professor Rice.

Mr. RICE. Thank you, Senator.

Mr. WEIL. Thank you, Senator.

Senator BREAUX. Okay, with that, I think we have completed our witnesses for this morning, and the Committee will be adjourned until further call of the Chair.

[Whereupon, at 12:35 p.m., the subcommittee was adjourned, subject to the call of the Chair.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF THE NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS

Mr. Chairman and members of the Consumer Subcommittee, the National Association of Federal Credit Unions (NAFCU) appreciates this opportunity to make a statement for the record as you consider reauthorization of the Federal Trade Commission (FTC). As the only national trade association which exclusively represents the interests of credit unions chartered by the federal government, the National Association of Federal Credit Unions has long advocated exempting Federal credit unions from the direct jurisdiction of the Federal Trade Commission in a manner similar to that afforded to commercial banks since 1914 and savings and loan associations since 1979.

I respectfully request that this statement by included in the official hearing record of your subcommittee as you review matters relating to the reauthorization of the Federal Trade Commission.

When the Federal Trade Commission Act was enacted in 1914, banks were specifically exempted from the direct regulatory and investigative authorities of the newly-created Commission because they were already regulated by the Federal Reserve Board. Savings and loan associations were granted a parallel exemption in July 1979, by the enactment of Public Law 96-37. Today, Federal credit unions are the only type of federally chartered depository institution directly regulated by the Federal Trade Commission.

As you and your colleagues in the Congress consider legislation to reauthorize the Federal Trade Commission jurisdiction, we respectfully request that you support inclusion in that legislation of an exemption for Federal credit unions from direct Federal Trade Commission jurisdiction. Not only has such an exemption been favorably reported by the Senate Commerce Committee in the 97th Congress, the 98th Congress and the 99th Congress; the full Senate overwhelmingly supported such an exemption when the 99th Congress approved S. 1078 on July 26, 1985. We request similar prompt and favorable action by the 100th Congress.

The precedent for exempting Federal credit unions from direct Federal Trade Commission jurisdiction is well established. In addition, such an exemption would eliminate unnecessary, costly, and duplicative regulation of Federal credit unions, which is a stated objective of the Financial Regulation Simplification Act of 1980 (Title VIII, Public Law 96-221). NAFCU believes that the National Credit Administration, which is the independent agency of the federal government with primary responsibility for the chartering, regulation, supervision, and examination of Federal credit unions, should regulate Federal credit unions with respect to consumer protection matters and most areas of antitrust, rather than the FTC.

Regulators Support Exempting Federal Credit Unions From FTC Jurisdiction

Regarding the proposal to exempt Federal credit unions from FTC jurisdiction, the Honorable Lawrence Connell, then Chairman of the National Credit Union Administration Board, stated in testimony before the Senate Committee on Banking, Housing and Urban Affairs in May of 1981:

Section 18(f)(1) of the Federal Trade Commission Act provides that the Federal Reserve Board has the authority to promulgate similar regulations for banks when the FTC issues a Trade Regulation Rule affecting banking or finance areas. The Federal Home Loan Bank Board was provided similar authority for savings and loan associations. We ask the Committee to consider granting the same authority to NCUA, so that Federal credit unions and their members will have the benefit of trade regulations that have been carefully considered by their supervisory agency.

When requested to present the views of the Federal Trade Commission on this suggestion, Ms. Linda Colvard Dorian, then the Deputy Director of the FTC's Bureau of Competition, commented on August 25, 1981:

The Commission supports a provision similar to that contained in Section 18(f) of the Federal Trade Commission Act, giving the National Credit Union Administration authority to issue trade regulation rules prohibiting unfair or deceptive practices by federally insured credit unions. The same reasoning which led the Congress to adopt this approach for savings and loan institutions insured by the Federal Home Loan Bank Board in Public Law 96-37 appears applicable to credit unions.

On April 6, 1982, the then chairman of the National Credit Union Administration Board, Edgar F. Callahan, wrote:

...concerning NAFCU's efforts in exploring the possibility of exempting Federal credit unions from the jurisdiction of the Federal Trade Commission....I am very supportive of efforts to eliminate such duplicative regulations and can state that this agency is prepared to ensure proper compliance in such matters. Therefore, I certainly would encourage your continued efforts in obtaining amendatory language to the Federal Trade Commission Act....

On February 4, 1985, NCUA Board Chairman Callahan reiterated his firm support for such a change in the law when he wrote:

...I continue to be very supportive of efforts to eliminate duplicative jurisdiction such as those subjecting credit unions to both FTC and NCUA regulation. Therefore, I strongly endorse enactment of legislation to grant credit unions the same exemption from the FTC already enjoyed by both banks and savings and loans.

More recently on February 27, 1986 the current Chairman of the NCUA Board, Senator Roger Jepsen, wrote to the Conferees on S. 1078 (99th Congress):

...NCUA is supportive of this amendment to eliminate the present unnecessary and duplicative regulatory scheme....NCUA is fully prepared to continue to ensure proper regulatory compliance if this amendment is enacted...

On July 26, 1985, the Senate approved the "Federal Trade Commission Act Amendments of 1985" (S. 1078). Section 11 of S. 1078, if enacted into law, would have provided Federal credit unions with an exemption from direct Federal Trade Commission jurisdiction parallel to that enjoyed by commercial banks and savings and loan associations. While final action on S. 1078 was deferred because of Conference Committee concerns unrelated to the Federal credit union exemption, the then Federal Trade Commission Chairman, James C. Miller III, in testimony before the Senate committee on Commerce, Science, and Transportation on April 24, 1985, noted that:

...An exemption for credit unions from FTC authority...thus placing them on a par with other federally regulated financial institutions, is altogether reasonable....

Credit Union Members Share A Common Bond

NAFCU would point out that Federal credit unions, unlike other types of regulated depository institutions, are prohibited by statute from serving the general public (12 U.S.C. § 1759). Every Federal credit union's charter spells out quite clearly the "field of membership" for that particular credit union. Every individual falling within a credit union's "field of membership" must share a "common bond" with other potential members. Each credit union's common bond will differ, but in every instance, it will be defined by either occupation, association, or a well-defined geographical boundary. For example, mere residency in the District of Columbia does not entitle a person to become a member of the Senate Employees Federal Credit Union. To become a member of the Senate Employees Federal Credit Union, an individual must either be an elected member of the United States Senate or work in the Senate.

Occasional questions have been raised concerning possible antitrust implications of Federal credit union mergers. The fact that Federal credit unions, by statute, are prohibited from serving the general public has led to an increased level of Federal credit union merger activity in recent years. During a recessionary period, one can anticipate an increased level of Federal credit union merger activity, since many Federal credit unions are composed of individuals who are employed by a common employer. When corporations confronted by economic realities seek merger partners, it is not uncommon for the Federal credit unions which serve the employees of the respective corporations to be merged as well. Such a merger preserves the integrity of all the parties involved.

For purposes of illustration, assume that a Constitutional amendment were passed which would abolish our present bicameral form of government and replace it with a unicameral form of government. At present, both the Senate and the House of Representatives have credit unions which meet the needs of the members and staff of the two respective chambers. Should the unicameral form of government be established, it would simply make sense to merge the two credit unions which presently serve the two chambers, rather than go through the expense and administrative nightmare of liquidating one in order that the members might join the other. These types of mergers occur with some regularity, tracking the corporate mergers of sponsoring businesses. In every instance, they are done subject to review by and the approval of the National Credit Union Administration, an independent agency of the federal government.

Number of Credit Union Mergers: 1973-1985

During the thirteen-year period extending from 1973 to 1985, there were on an average 319 credit union mergers per year which were conducted under the supervision of the National Credit Union Administration. As is the case with all regulated depository institutions, the volume of merger activity has increased somewhat in recent years, as indicated below:

Year	Number of Mergers
1985	421
1984	642
1983	706
1982	633
1981	333
1980	313
1979	193
1978	196
1977	195
1976	198
1975	196
1974	76
1973	54

Most credit union mergers are voluntary. In fact, 87.9 per cent of credit union mergers in 1985 and 76.8 per cent over the last five years have been voluntary. A voluntary merger makes sense when a credit union has recently lost all or part of its field of membership or is no longer economically viable.

Integrity of Credit Union Mergers

Officials of the Executive Office of the Antitrust Division of the Department of Justice, as well as those with the Office of General Counsel of the National Credit Union Administration, report that despite the substantial level of credit union merger activity in recent years, there is not a single reported case of any federal agency ever challenging a credit union merger on antitrust grounds. This is a commendable record, of which the National Credit Union Administration should be justifiably proud.

Retention of Justice Department Jurisdiction

There is nothing in this proposal which would alter the authority of the Justice Department to bring a cause of action in the event that the Department wished to challenge a Federal credit union merger at any future date, should the exemption be enacted into law. In addition, officials of the Executive Office of the Antitrust Division of the Department of Justice indicate that just as the Department retained jurisdiction over savings and loan associations following the enactment of Public Law 96-37, so would the Justice Department retain similar jurisdiction over Federal credit unions should a parallel Federal credit union exemption be enacted into law. Indicative of NCUA's effort and concern in this area is the fact that the Justice Department views are obtained whenever deemed desirable.

It is our understanding that whenever the National Credit Union Administration considers the approval of credit union mergers, NCUA requires staff consideration of the economic impact and legality of a proposed merger as a precondition to consideration for approval. The National Credit Union Administration for years has reviewed merger applications in light of the antitrust laws and ensured compliance with those statutes in order to obtain approval of a merger application.

Conclusion

Mr. Chairman, NAFCU would once again ask that you and your colleagues view favorably language similar to that contained in Section 11 of the "Federal Trade Commission Act Amendments of 1985" (S. 1078) exempting Federal credit unions from the direct jurisdiction of the Federal Trade Commission (FTC). As the record clearly indicates, Federal credit union mergers have historically been administered in a highly responsible manner.

Congressional enactment of such an exemption would also conform to the finding contained in Title VIII of Public Law 96-221:

The Congress hereby finds that many regulations issued...often impose costly, duplicative and unnecessary burdens on both financial institutions and consumers....Regulations should achieve legislative goals effectively and efficiently. Regulations should not impose unnecessary costs and paperwork burdens on the economy, on financial institutions, or on consumers.

The National Credit Union Administration is required by the Federal Credit Union Act to regulate Federal credit unions. It must supervise the Federal credit union community comprehensively, intensely, and continuously. It must, and does, exercise its powers in plenary fashion for the protection of the member-owners of credit unions. While the interest and efforts of the FTC in preventing or eliminating unfair trade practices are to be encouraged, at the same time the resources of the National Credit Union Administration may be used more effectively than those of the FTC in the very area where NCUA has special expertise and is in a particularly effective position to make a contribution.

NAFCU, therefore, urges you and your colleagues in the Congress to provide Federal credit unions with a parallel exemption from the direct jurisdiction of the Federal Trade Commission similar to that presently granted to commercial banks and savings and loan associations. To do otherwise would perpetuate inefficiencies in government regulation of the financial marketplace.

STATEMENT OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

The NAM welcomes this opportunity to submit a statement in support of the long overdue reauthorization of the Federal Trade Commission. The Commission s last authorization was passed in 1980 and Congress has been unable to pass a reauthorization since. The time has come to pass an FTC reauthorization.

The National Association of Manufacturers is a voluntary business association of over 13,000 corporations, large and small, located in every state. Members range in size from the very large to over 9,000 smaller manufacturing firms, each with an employee base of less than 500. NAM member companies employ 85 percent of all workers in manufacturing and produce over 80 percent of the nation.s manufactured goods. NAM is affiliated with an additional 158,000 businesses through its Associations Council and the National Industrial Council.

NAM members are very sensitive to the impact of FTC actions upon their businesses, both from the perspective of the Commission's antitrust or "unfair methods" jurisdiction and from the Commission's consumer "unfair or deceptive acts or practices" mandate. Failure to enact an FTC reauthorization is very unsettling to our members because of the lack of a firm Congressional commitment to the agency's activities. NAM members view the FTC reauthorization process as a significant opportunity to reexamine areas that need refinement. During the last two Congresses, an FTC reauthorization bill was introduced with bipartisan support. We understand that a similar bill will be introduced for the 100th Congress and NAM wishes to express its support for this measure once again.

The FTC is an agency of Congress; as such, all Commission powers emanate from Congress. The FTC Improvements Act of 1980 illustrated that the reauthorization process permits Congress, the public, and the federal agency the opportunity to reconsider both the direction of the underlying mandate and the means by which such responsibilities are carried out. During the FTC reauthorization process conducted in 1979/80, Congress proceeded with the view that limitations on the agency's exercise of federal investiqatory and enforcement authority were needed. While the underlying policies of the agency remained intact, Congress reached a consensus regarding the need for limitations upon the discretionary enforcement power of the agency, based upon evidence brought to light during reauthorization hearings.

The fact that the FTC remains on a two-year reauthorization cycle allows constituents of the agency, including the NAM, the opportunity to bring before Congress relevant information relating to the success or failure of the agency in handling its mission. As has been seen in recent times, the reauthorization process, particularly with respect to the FTC, has taken on added importance. The basis for this heightened sensitivity to FTC authorization results from an acknowledged need for additional clarity of the Commission's discretionary authority and compliance requirements. We need not dwell upon actions initiated during the 1970s that documented the abuse of FTC authority, or the resulting costs incurred in attempting to mitigate and prevent such activity. For purposes of this statement, we need only cite the shared monopoly case against the cereal industry that the commission pursued with all vigor—based upon no more authority than the broad discretion bestowed upon the agency under the vague concept of unfair methods of competition and without any corresponding basis in fact or necessity. Under its consumer jurisdiction we need only cite the lengthy, expensive, and futile attempt to regulate and prohibit advertising directed at children, once again on the theoretical basis of unfairness. The FTC in more than a dozen proposed rules continues to attempt to regulate many of the sectors of our economy, for example so-called "product quality" issues, that have never before been regulated and indeed have been repeatedly rejected by Congress as fit areas for FTC intervention.

The NAM views federal intervention, through the FTC or other agency action, as a course which should be pursued with caution. The vast power and resources of the federal government should be reserved for those cases where policy guidance is explicit, substantial injury is likely to occur and could not be reasonably avoided, and the costs of the injury have a net effect that outweighs the overriding benefits to consumers or competition. NAM specifically urges that Congress, during this reauthorization process, focus upon the elements that form the basis for FTC prosecutorial and rulemaking discretion. Such a focus, we believe, will lead Congress to the recognition that past experience with the lack of statutory checks on the zeal of the Commission staff evidences a need for clear congressional direction. Further, the NAM suggests that Congress employ this authorization process to channel the resources of the Commission and to enunciate with clarity the basis for federal intervention consistent with policies that seek to accomplish deterrence, punishment and compensation. Each of these points is discussed below, in addition to the NAM's position on those provisions contained within the FTC Improvements Act of 1980.

The NAM, so as not to detract from the need for Congress to focus on FTC jurisdiction relating to "unfair or deceptive acts or practices", has deferred comment on that portion of the FTC Act dealing with antitrust matters during these reauthorization hearings. This, by no means, should be construed as NAM acquiescence to the present formulation, interpretation and application of that jurisdiction. Rather, the NAM considers the "unfair methods" jurisdiction to be, like the "unfair or deceptive acts or practices" jurisdiction, also a subject for needed clarification by Congress. By separating out this issue during these authorization hearings, the NAM urges that Congress soon return to consider the enforcement ramifications of the present application of "unfair methods". Such a focus on "unfair methods" jurisdiction should closely follow Congress, resolution of the definitional and prosecutorial difficulties inherent in the application of "unfair or deceptive acts or practices."

The issue of greatest concern to the membership of the NAM, at this time, stems from the ability of the Commission, under Section 5(a)(1), to challenge conduct on the basis of a prohibition of "unfair or deceptive acts or practices." That

provision was created by Congress to bestow upon the FTC power to prevent conduct which bears no relationship to competition.

The NAM membership has struggled to define the meaning of the term unfair. As constituents of the FTC and subject to possible prosecutions and rulemakings, NAM members have sought to interpret carefully the legislative history and court decisions concerning the meaning of unfairness.

The legislative history accompanying Congress' enactment of unfairness provides little guidance for the purposes of aiding compliance. The legislative history merely affirms that the term "unfair" is an ambiguous standard subject to subjective interpretation.

The NAM is certain that, without congressional input on the elements that form the basis for Commission actions, neither reliance on these elements nor clarity will be reflected in FTC actions. The fact that the leadership of the Commission is subject to change leads one to believe that earlier FTC statements of Commission interpretations may not be controlling. similarly, as the issue of unfairness now stands, the subjective determinations as to what form of conduct constitutes "unfairness" will remain vested in the whims and prejudices of the Commission staff and members.

The only clarity that can be achieved and that will provide constituents of the Commission with some degree of certainty is to establish a series of criteria, each of which must be met prior to the FTC challenging any form of conduct premised upon consumer unfairness. By adopting this position, the NAM is urging Congress to reconsider the circumstances in which Commission action is desirable and productive to the consumer.

The NAM is confident that the past problems that have befallen the FTC and its constituents—needless prosecutions, improper allocations of resources, and vast expenditures of dollars—can be avoided through codification of prosecutorial and rulemaking standards.

The test for unfairness endorsed by the FTC and supported by NAM is embodied in the March 5, 1982, Commission letter to the Senate Committee on Commerce, Science, and Transportation, and in last year's bill, S. 1078. It would require the Federal Trade Commission and its staff to demonstrate the bases for federal involvement.

This prosecutorial test is composed of three elements: 1) substantial consumer injury; 2) inability of consumers to reasonably avoid such injury; and 3) the injury in question is not outweighed by countervailing benefits to consumers or competition generally. Each of these elements, in our opinion, should be considered and viewed as essential determinations prior to commitment of the resources of the FTC on a particular case. Actions should be premised solely on the establishment of each criterion. Failure to substantiate a basis of action because one element may be lacking would serve to prevent any FTC involvement.

Substantial Consumer Injury

The first element, the need to prevent harm, should be the most basic consideration. The injury must be of such substantial nature as to justify plainly federal intervention. As the Commission stated in its December 17, 1980, letter to Congress concerning unfairness:

> Emotional impact and other more subjective types of harm...will not ordinarily make a practice unfair. Thus, for example, the Commission will not seek to ban an advertisement merely because it offends the tastes or social beliefs of some viewers.

We fully agree with this initial formulation of the meaning of substantial consumer injury. However, we view this formulation as initial because it has been cast in a negative manner as to what shall not be deemed substantial. NAM urges Congress to follow the Commission,s elaboration of March 5, 1982, on the meaning of substantial consumer injury and we suggest that this principle be codified so as to provide more certainty. In the letter, the Commission states'

> As a general proposition, substantial injury involves economic or monetary harm and does not cover subjective examples of harm such as emotional distress or offenses to taste or social belief.

Avoidability of Consumer Injury

The NAM also supports the Commission with regard to the test for actionable consumer injury. In its March 5, 1982 letter, the Commission formulated this test as follows:

...an unfair act or practice must be one which consumers could not reasonably have avoided. The commission should not be involved in rectifying the unfortunate choice of a particular consumer decision. It should confine its activities to curb behavior that takes unfair advantage of consumers' inadequate knowledge in reaching a decision or inability to protect themselves from such behavior.

NAM recommends that this principle be codified. Each branch of the FTC's three-pronged test for consumer injury is of significance from a technical and legal point of view. This requirement—that the Commission act only where consumers have no reasonable means of protecting themselves—is critically important. Indeed, it is the key to ensuring that FTC actions are meaningful contributions to the functioning of a free marketplace.

The FTC position supported by the NAM is no retreat to the old days of "let the buyer beware." Under the "reasonably avoidable" standard, the Act (Section 5) would continue to reach abusive conduct that distorts or frustrates consumer choices. Examples would include the selling of phony cures to seriously ill cancer patients [see, e.g., Travel King Inc., 86 F.T.C. 715, 774 (1975)] or refusing to reassemble appliances supposedly dismantled for inspection until a contract is signed. Holland Furnace Company v. FTC, 295 F.2d 302 (7th Cir. 1961); cf. Arthur Murray Studio Inc. v. FTC, 458 F.2d 622 (5th Cir. 1972). Both of these examples, drawn from established FTC precedents, illustrate consumer harm that would continue to be actionable.

At the same time, the FTC's practical approach clearly confirms that the Commission has no place as a "national nanny" or a utopian social and economic engineering agency with a mandate to tell Americans what is good for them. For example, where adequate maintenance, use and care information for a product is available, consumers who come to grief because they choose to ignore this information should not be treated as wards of the federal government. NAM policy language is explicit in supporting and encouraging disclosure of information to consumers. After all, if a seller's product is unsuitable or the seller's conduct is in fact unreasonable, consumers in the marketplace will penalize it far more quickly and effectively than the Commission.

At the core of our social and economic system is our faith in free and informed individual decision-making. In the political arena, our society tolerates no interference with the individual's free choice in the voting booth. In the economic sphere also, we should tread cautiously before stripping the individual of his rights and responsibilities as a consumer. Countervailing Benefits

The determination of countervailing benefits will force a matter in question to be fully balanced between the potentially harmful act or practice and the net practical benefit to consumers or competition. This balancing of interests would require the Commission to quantitatively and qualitatively reduce its perception of a potential injury by the factors of economic costs and benefits that a practice may entail. In reaching this determination of "net" effects, the Commission should account for the costs of a prospective remedy, costs to the parties, increased paperwork and regulatory burdens, reduced incentives for innovation and capital formation and other similar considerations.

The NAM views the Commission letter of March 5, 1982, as constructive in this respect and urges Congress to codify the principles and intent of that letter? The Commission's letter states a position wholly consistent with that of the NAM with regard to countervailing benefits:

...the injury should not be outweighed by consumer or competitive benefits resulting from the challenged practice. Clearly, most business practices involve an economic and social mixture of costs and benefits; hence, unless a particular practice has the net effect of being injurious, the Commission should refrain from finding it unfair. In reaching its decision, the Commission should take into account costs related to a prospective remedy, including but not limited to direct costs to the parties, increased paperwork and regulatory burdens, reduced incentives for innovation and capital formation and like matters.

Summary of Three Element Test

The NAM urges Congress to enact and codify a three element requirement which, upon being met, would substantiate a basis for FTC actions premised upon "unfair...acts or practices" jurisdiction. As evidenced by the Commission in its letter to Congress, the three criteria--substantial consumer injury, reasonable avoidability and lack of countervailing benefits--properly reflect a reasoned approach to balancing the federal interests in prosecution with the costs and benefits that may result from a questioned practice. This test further illustrates and reflects the sensitivity of Congress, the FTC and its constituents to the need to confine government intervention to acts and practices that require the powers and resources of the federal bureaucracy.

Turning to another issue, the NAM suggests that Congress reconsider the present construction and underlying basis of section 5(m)(1)(B), the civil penalty section. While valid arguments exist to support repeal of this section, the NAM urges Congress to do no less than amend the Commission's 5(m)(1)(B) authority.

Under this Section, the Commission may seek to impose civil penalties of up to $10,000 against companies who allegedly violate final cease and desist orders entered in proceedings against other firms. NAM's concern relates to the inherent lack, within the substantive and procedural terms of Section 5(m)(1)(B), of due process accorded parties subject to the provision. Section 5(m)(1)(B) permits the FTC to impose penalties and requirements upon companies who were not parties to, nor provided notice and opportunity to be heard in, original cease and desist proceedings.

NAM urges that should Section 5(m)(1)(B) authority continue, Congress must ensure that all elements of "due process," including a notice to be heard and an opportunity to participate, be required as a procedural requirement for the implementation of Section 5(m)(1)(B) penalties.

FTC Improvements Act of 1980

Intervenor funding: NAM has long opposed the funding, through taxpayers' dollars, of witnesses and public participants in agency rulemaking proceedings. Our premise throughout has been that the funding of intervenors extends beyond the policy justification of encouraging a broad range of views to agency proceedings, to having the general revenues supporting the arguments and philosophy of a small segment of the public. In this regard, NAM was active in opposing section 18(h) (Intervenor Funding) of the FTC Act, and correspondingly was greatly supportive of the amendments in the 1980 FTC Improvements Act, which placed a cap on the level of compensation that may be paid to rulemaking participants. Although the Commission, at this time, has no funds with which to carry out any form of an intervenor funding program, the cap on disbursements under that program are subject to expire, and the NAM wishes again to express its disapproval of any form of an intervenor funding program and urges its discontinuation.

The NAM also supports an amendment to the FTC Act that requires a prevalency of an unfair or deceptive act before proposing a rule. We find the provision in last year's bill—S. 1078--as suitable for the purpose.

Also, the legislative veto mechanism (including the appeals procedure) in the 1980 Act has been declared unconstitutional and a new procedure must be found. NAM has long supported imposition of a legislative veto mechanism for reasons of fairness and as a means to provide a check and balance upon the regulatory system. NAM will continue to press for a legislative veto mechanism throughout the regulatory process. NAM will support a veto mechanism that provides for a resolution of disapproval by both Houses of Congress with a presidential signature requirement. We believe that this proposal will pass the constitutional test set out in the Chadha decision. It is important to note that the testimony of FTC Chairman Dan Oliver, which was endorsed by the full Commission, included support for a constitutional legislative veto mechanism.

NATIONAL CREDIT UNION ADMINISTRATION,
Washington, DC, January 29,1987.

Hon. ALBERT GORE, JR.,

Chairman Subcommittee on the Consumer, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR SENATOR GORE: I would like to take this opportunity to advise you of the views of the National Credit Union Administration Board concerning a proposed amendment to the Federal Trade Commission Act. The amendment would exempt Federal credit unions from Federal Trade Commission jurisdiction to the same degree which banks and savings and loan associations have already been exempted. NCUA has been and continues to be very supportive of this initiative to eliminate the current duplicative regulatory scheme.

Presently Federal credit unions are subject to both the jurisdiction of the Federal Trade Commission and the National Credit Union Administration with respect to investigatory and enforcement authority. In order to receive the same exemption which has previously been granted to banks and savings and loan associations, Sections 5, 6, and 18 of the Federal Trade Commission Act should be amended to exempt Federal credit unions. The language contained in Section 11 of S. 1078—a bill which passed the Senate in the 99th Congress—has been reviewed by my staff, and we are convinced that such language would properly achieve that goal.

The National Credit Union Administration is prepared to ensure proper compliance in such matters. Our authority under Section 120 of the Federal Credit Union Act (12 U.S.C. 1766) and Section 206 of the Federal Credit Union Act (12 U.S.C. 1786) is sufficient to protect the interests of Federal credit union members. NCUA will, of course, promulgate substantially similar rules to those promulgated by the Federal Trade Commission under Section 18(F) of the Federal Trade Commission Act unless we determine that such act or practices are not unfair or deceptive with respect to credit unions.I thank you for the opportunity to comment on this matter and would encourage you and your colleagues on the Committee to support amendatory language to the Federal Trade Commission Act exempting Federal credit unions from the jurisdiction of the Federal Trade Commission.

With kindest personal regards, I am

Sincerely,

ROGER W. JEPSEN, *Chairman.*

AMERICAN DENTAL ASSOCIATION,
Washington, DC., February 17, 1987

Hon. ALBERT GORE, JR.,

Chairman Subcommittee on the Consumer, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR SENATOR GORE: The American Dental Association appreciates the opportunity to comment on the proposed reauthorization of the Federal Trade Commission. The dental profession and the Commission have had several confrontations in recent years with regard to the traditional regulation of the professions by several states. While the Commission now limits its activities with regard to the quality of care provided in professional practices, it remains actively involved in the commercial aspects of those practices. Because of the difficulties that have been experienced in separating the Commission's authority from that of the states, the Association continues to support proposed generic reforms that will clarify the Commission's jurisdiction and provide better safeguards in its investigatory procedures. Such reforms, which were included in the FTC reauthorization in the last Congress, include a definition of "unfair practices," a prevalence standard of unfair or deceptive acts or practices before a trade regulation rulemaking could be initiated, and a statutory application of the "state action" doctrine to the competition authority of the Commission. The Association supports the Commission in its efforts to recover its authority to investigate the business of insurance. The insurance industry is one whose activities affect virtually every citizen. The current limitations on the Commission's activities in this area deprive the public of the analyses of that industry that the Commission is prepared to provide and that the public is entitled to have.

We ask that these comments be made a part of the official record of the Subcommittee's hearings.

Sincerely,

WILLIAM E. ALLEN, D.D.S.
Director Washington Office

FEDERAL TRADE COMMMISSION,
Washington, DC., February 27, 1987

Hon. ALBERT GORE, JR.,
Chairman Subcommittee on the Consumer, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR SENATOR GORE: Thank you for the opportunity to testify about reauthorization of the Federal Trade Commission ("FTC" or "Commission") at the Consumer Subcommittee hearing on February 4, 1987. I was heartened by the support for expeditious reauthorization expressed by you and other Members of the Subcommittee. It also was gratifying to note similar support from the overwhelming majority of witnesses who testified on both days of hearings.

At the February 4th hearing, you sought responses from my colleagues and I on whether we were concerned that there might be a danger that the Better Business Bureau ("BBB") was becoming too aggressive in responding to consumer complaints. Time did not permit me to reply during the hearing itself, so I hope this written answer will suffice. I certainly detect no clear or present danger that the BBB will overstep its bounds in such a manner. Based upon my experience at the Commission, the BBB has an important consumer protection function and is to be commended for its efforts in this area. At the same time, it must be recognized that the BBB is only a complement to, and not a substitute for, vigorous FTC enforcement against unfair or deceptive acts and practices.

Senator Breaux asked at the hearings whether it was the opinion of each of the commissioners that reporting on predatory pricing is comparable to reporting unicorn sightings. In my view, the paramount mandate of the Commission is protecting consumers' interests. Accordingly, we have a duty to protect consumers against predatory practices to the extent they take place, since consumers ultimately lose out if companies are able to exercise market power and raise prices or reduce output. The difficulty, of course, is separating instances where a company is exercising predatory behavior from cases where a company simply is competing vigorously to the benefit of consumers. Careful analysis of the facts is needed to assure we do not inadvertently hurt consumers while trying to help them.

In sum, claims of predatory pricing ought not be ignored, and we should consider carefully instances where predatory pricing is alleged. With these thoughts in mind, I would have to say that I do not agree that reporting on predatory pricing is akin to reporting unicorn sightings. In keeping with the animal metaphors employed to date, I would liken instances of predatory pricing to human encounters with enraged grizzly bears—both are rare events but extremely dangerous when they occur.

Thank you again for requesting my thoughts on these matters. I look forward to working with you and all Members of the Subcommittee on reauthorization and other FTC issues. I am confident that in the spirit of compromise and conciliation you suggested, we can move forward together to secure the long-overdue reauthorization of the Federal Trade Commission.

I respectfully request that this letter be made part of the hearing record.

Sincerely yours,

ANDREW STRENIO, JR., *Commissioner.*

FEDERAL TRADE COMMISSION,
Washington, DC, March 9, 1987.

Hon. ALBERT GORE, JR.,
Chairman Subcommittee on the Consumer, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR SENATOR GORE: The Commission understands that on Tuesday, March 10, 1987, the Senate Committee on Commerce, Science and Transportation is scheduled to mark up a bill to authorize the Federal Trade Commission through Fiscal Year 1990. We further understand that the bill in question, sponsored by you, Chairman Hollings and Senators Danforth, Breaux, McCain and Kasten, among other things, includes a provision concerning the staffing of the Commission's regional offices that was not included in the authorization bills from the previous Congress that formed the basis for the Commission's testimony before your Subcommittee in February, 1987.

The provision, if enacted, would require the Commission to redirect up to $858,000 from the Economic Activities Mission and the Office of Policy Development to the regional offices. As we did not have an opportunity to consider this proposed provision in the course of our hearings on February 4, we would welcome an opportunity to present our views about it to you either orally or in writing. The Commission is within 30 days of completing a study concerning the resources that should be committed to our regional offices, and we would be glad to discuss that subject with you. In addition, we would appreciate being able to discuss with you the most appropriate sources within the Commission for any transfers of resources that might be shifted to the regions. For now, however, we simply ask that you express our concern to the Committee during its mark—up session that the amount of resources Section 17 proposes to shift to the regions may or may not be the optimal amount and drawing these resources from the sources proposed may be damaging to our efforts to meet our statutory responsibilities.

By direction of the Commission.

Sincerely,

DANIEL OLIVER, *Chairman.*

FEDERAL TRADE COMMISSION,
Washington, DC, March 16, 1987.

Hon. ALBERT GORE, JR.,

Chairman Subcommittee on the Consumer, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR SENATOR GORE: During the February 5, 1987, hearing on the reauthorization of the Federal Trade Commission before the Consumer Subcommittee of the Committee on Commerce, Science, and Transportation, you asked for an overview of my priorities as Chairman. I am happy to respond to your inquiry.

Since becoming Chairman last April, I have noted on more than one occasion that too often in the past, consumer welfare has been imperiled by government over—regulation. Governmental restraints have shackled free markets, frequently resulting in fewer choices and higher prices for consumers. The lesson we should have learned by now is that the free market, and not government, is the preferred catalyst for innovation and efficiency, and the primary guardian of consumer welfare.

Our programs are thus founded on the principle that the free market produces and distributes goods and services desired by consumers far more efficiently, and at lower cost, than any mechanism contrived by government. The Commission's task is to intervene in those situations in which the market has failed to function and only to the extent necessary to correct the failure

On the antitrust side, we shall continue our vigorous enforcement activities. I intend to encourage the Commission to redouble our efforts to eradicate restraints upon competition in the health care field. Particular emphasis shall be placed on eliminating agreements to refrain from competitive behavior such as truthful advertising, and on challenging boycotts of non—doctors such as nurse—midwives and of doctors who engage in non—traditional forms of practice such as HMOs and PPOs. I shall seek also to end restraints upon innovative methods of distributing medicine, in particular, prohibitions on advertising, dispensing by doctors, and computerized transfer and remote pick—up of prescription drugs.

The health care area is of particular interest because it consumes more than ten percent of disposable personal income in the United States—a percentage that is likely to increase significantly as "baby boomers" age

Similar efforts shall be undertaken with respect to other state licensed occupations and professions. I shall seek to have the Commission challenge both private agreements not to compete and state—imposed barriers to competition and entry. Indeed, I hope that we can persuade states to end altogether economic licensing of certain occupations, such as taxicab operators, barbers, and cosmeticians.

I shall encourage the Commission to challenge abuses of government regulatory schemes by private firms seeking some competitive advantage. These abuses take many forms, including the filing of antidumping petitions and sham filings with other regulatory agencies to deter entry and the using of standards—setting to deter innovation and entry.

The Commission shall, of course, continue to monitor merger activity under the Hart-Scott-Rodino program and, where necessary, take formal enforcement action against violations of reporting requirements. We shall also act vigorously to prevent consummation of anticompetitive merger transactions.

My attention shall be directed also to ending anticompetitive restraints imposed as a result of past Commission orders.

With respect to the Commission's consumer protection program, it may be appropriate to intervene when adequate product information is unavailable or the information provided is false or misleading. The same holds true when companies systematically violate established rules of the marketplace—such as by failing to perform contracts, refusing to honor warranty commitments, or defrauding consumers.

Within this general framework, there are several areas that shall continue to receive my special attention. I shall encourage the Commission to target for forceful action cases of outright fraud, a category of misconduct that costs consumers millions of dollars each year. For example, the Commission has recently initiated several cases alleging misrepresentations in connection with the sale of rare coins to consumers. These cases come on the heels of a series of cases in which the Commission has charged various firms and individuals with fraud in the sale of "investment" gemstones, lottery filing services for oil and gas leases on federal lands, and lottery filing services for cellular telephone licenses being granted by the Federal Communications Commission. The Commission continues to search for other telemarketing fraud cases, an area in which I recently announced, along with the National Association of Attorneys General, a redoubled effort at federal/state coordination and cooperation.

Another area of concern, and one in which the Commission has been active, involves systematic breaches of contract for which consumers have no effective recourse. The Commission's cases alleging the sale of essentially worthless services by certain "credit repair" firms also fall into this category.

Deceptive advertising practices will maintain a prominent position on my list of priorities. In this regard, it is important to note that the Commission's program is designed to supplement the industry's self—regulatory effort through the National Advertising Division of the Better Business Bureau and its appellate body, the National Advertising Review Board. Nevertheless, there will continue to be many matters that warrant formal Commission action, including cases alleging misrepresentations of energy—saving features of products or other false product performance claims. Particular attention shall be given to false claims for foods, drugs, and other health—related products, because of the potential for serious consumer harm as a result of misrepresentations in the markets for these products, and the inability of consumers to evaluate product claims at acceptable cost.

Monitoring compliance with the various rules administered by the Commission, as well as formal enforcement actions for violations thereof, shall continue to be priorities of mine. Included under this general rubric are the various consumer credit statutes and their implementing regulations, as well as the trade regulation rules that have been promulgated by the Commission itself. In this regard, I shall continue to make use of our Franchise Rule to halt business fraud quickly, and shall search for companies that are causing substantial consumer injury by violating the dictates of the Mail Order Rule.

The competition advocacy program, in which we respond to inquiries from state and other federal entities, also plays an essential role in fulfilling the Commission's role as consumer advocate.

I look forward to working with you and the subcommittee in the months ahead. Please let me know if I may be of further assistance.

Sincerely,

DANIEL OLIVER, *Chairman.*

BOSTON UNIVERSITY,
Boston, MA, March 3, 1987.

Hon. ALBERT GORE, JR.,

Chairman Subcommittee on the Consumer, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR SENATOR GORE: My testimony at the subcommittee's February 5 hearings on the Federal Trade Commission urged that there was neither a constitutional nor a legislative policy justification for exempting commercial advertising from the FTC's unfairness jurisdiction. During the hearing Senator Kasten asked me to identify any specific instance in which a past Commission action would have been precluded by such an exemption.

My response was twofold. First, I stated that I had not testified that some past FTC regulation of commercial advertising rested solely on unfairness grounds. Second, I volunteered to identify in writing illustrative actions in which an unfairness rationale was significant to the regulation of advertising.

As to the first point, review of my written statement and the transcript of my testimony confirms that I at no point stated that unfairness has been the sole theory for regulation of commercial advertising in any past proceeding. With respect to proceedings in which the theory has been utilized in conjunction with the more narrowly-focused deception test, the most obvious instance was the promulgation of the legislatively superseded Cigarette Labeling and Advertising Rule. In addition, I refer the Subcommittee to the following illustrations:

Pfizer, Inc., 81 F.T.C. 23 (1972) (creating the foundation of the advertising substantiation doctrine); Advertising of Opthalmic Goods and Services Trade Regulation Rule, 16 CFR 456 (1986), Statement of Basis and Purpose, 43 Fed. Reg. 23,992 at 24,000-01 (1978); Labeling and Advertising of Home Insulation Trade Regulation Rule, 16 C.F.R. 460 (1983), Statement of Basis and Purpose, 44 Fed. Reg. 50, 242 (1979).

The short list preserves an advertising emphasis. It could be embellished. What is most important is that unfairness analysis has been used when resort to the deception concept would unduly stretch the latter. That is amply documented in my own research and that of others, including that of present and former FTC staff members such as Neil Averitt and Richard Craswell. Each shows that unfairness analysis has been most often employed in dealing with market information problems.

It is anamolous that the advertising industry and others consistently have objected that deception was becoming too elastic a concept, but now hail its elasticity in urging that unfairness jurisdiction is not necessary. Further, the argument is unsound. Deception has lost some of whatever elasticity it once had.

Equally perplexing is that advertising industry representatives and Senator Kasten asserted on February 5 that the unfairness exemption would not impair the FTC's public protection mission. The reason stated was that there has not been one instance in which unfairness has been the sole basis for the regulation of commercial advertising. If, as asserted, unfairness regulation has not occurred, how can it logically be argued that FTC retention of unfairness authority regulation chills commercial advertising?

There is an important and related point that came up but was dropped during the panel colloquy. The recent International Harvester decision narrowed the deception concept vis a vis the broader unfairness jurisdiction that subsumes it. It is, in effect, a shrunken rather than a a stretchable concept. A by-product is that extension of the temporary 1980 unfairness restriction would free conduct that once would have been subject to deception regulation from any FTC review. International Harvester makes it very important to retain the availability of the unfairness rationale at the margin where deception once applied.

In summary, the proposed exemption would ill-advisedly deprive the Commission of authority to regulate in areas in which it has acted. Further, recent developments in deception cases would vest exempted commercial advertising with a degree of immunity that is significantly greater than anyone would have supposed when the exemption was adopted as a temporary measure in 1980. I strongly urge that you not report a bill containing such an exemption.

Sincerely,

DAVID A. RICE, *Professor of Law.*

STATEMENT OF JOHN J. MOTLEY III, DIRECTOR OF FEDERAL GOVERNMENTAL RELATIONS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

On behalf of the over 500,000 members of the National Federation of Independent Business, we thank the Chairman and the Committee for the opportunity to present our views on the current Federal Trade Commission (FTC) prohibition on investigating the "business of insurance."

We at NFIB are encouraged by FTC Chairman Daniel Oliver's recent call for Congress to re-examine the current prohibition. NFIE believes that every opportunity to alleviate the liability insurance crisis should be examined by the federal government, especially those efforts to ensure the insurance industry is operating in a competitive marketplace.

As you may know, the National Federation of Independent Business has been concerned over the years about the general issue of insurance. We primarily represent main street and rural small businesses—our average members employs less than ten individuals. Our members could be considered a leading indicator of the economy. When the general economy prospers, our members generally prosper. When the economy does not do so well, our members generally feel immediate economic pain through lower sales of goods and services.

NFIB members were among the first to feel the so-called "liability insurance crisis" experienced in our country over the past several years. We used the phrase "liability insurance crisis" because many saw no logical or market-based justification for small business liability insurance premiums dramatically increasing in price regardless of their risk rating, and for the significant cuts many faced in insurance coverage. NFIB has received many calls and letters from small business owners who were good risks for liability insurance policies but who cannot even get insurance, no matter the price, because policies were no longer offered.

We have requested to present this material for the record because the liability insurance issue is probably the most critical and serious issue confronting small business today. NFIB's Institute for Enterprise Advancement issued its *Small Business Problems and Priorities* in June of last year, ranking the top 75 problems small businesses face. In that survey small business ranked the cost of health insurance as its number one problem area, with 33% of those sampled citing it as a critical problem. They ranked the cost and availability of liability insurance as the number two problem. However, 38% of small businesses viewed this as a *critical* problem, *The highest percentage describing a problem as "critical" in the survey.*

Furthermore, the number one priority at the White House National conference on Small Business, made up of 1,813 delegates and held in Washington last August, was the liability insurance issue.

All of these data tell us that the insurance issue is on the minds of small business owners everywhere and that action must be taken to resolve the problem.

While you may have heard examples of small business difficulties with liability insurance, I would like to give the committee some examples of problems generally being faced by NFIB members. They include:

> A laundromat owner in Corpus Christi was sued because a lady was mugged in one of his laundromats. He refused to pay, but his insurance company settled with the lady out of court. In 1985 he paid $900 for $2 million in coverage. In 1986 he is paying $3,625 for $1 million in coverage.

A small chemical company (14 employees) on Gulfport, Mississippi paid $4,500 for $300,000 coverage. In 1986 they have been quoted a premium of $38,000 for $500,000 coverage.

A campground in Hagerstown, Maryland in 1985 was charged less than $1,000 for $1 million in coverage. In 1986 the same coverage costs $8,000.

A plumbing and heating contractor in Warren, New Jersey received notice that his policy had been cancelled without explanation.

An aircaft corporation in Waco, Texas paid $25,000 in 1983, $50,000 in 1984, and $200,000 in 1985 for $2 million in coverage.

A five-and-dime store in New Lexington, Ohio has seen premiums increased 20% between 1984-1985 and 50% between 1985-1986.

A manufacturer of food processing machinery in Marblehead, Ohio paid $50,000 with a $2,500 deductible in 1985. In 1986 the premium is $150,000 with a $50,000 deductible. The 1986 policy would also require the manufacturer to pay legal expenses for settling claims and to provide a letter of credit to the insurer in the amount of $300,000.

An elevator repair and maintenance company on Staten Island paid $3,500 for $5 million in coverage in 1984. In January 1985 the policy cost $17,500. In July 1985 the policy was cancelled. Another carrier has offered coverage for $72,000 in annual premiums.

An auto parts and towing company in Walton, Ohio is being charged $20,000 this year for coverage which cost $11,000 last year.

An insurance agent in Boundbrook, New Jersey received notice from two companies that they were no longer accepting any applications for commercial liability insurance. Also, these companies were reviewing all renewals for possible termination.

NFIB believes there must be a comprehensive solution to the insurance liability crisis. We believe that there are three causes which have contributed to the problems we face today:

(1) An out-of-control tort system;
(2) Poor insurance industry business practices;
(3) A patchwork quilt of haphazard state regulations.

Recognizing multiple causes of the problem requires us to look at multiple solutions. It would be irresponsible to attack one problem area, resolve it, and then walk away from this issue thinking it is solved. There must be a comprehensive approach and solution.

Furthermore, our members do not want to single out one individual, group, or institution to blame for the crisis. They only want it resolved so they may go about their business—the business of small business, generating new wealth and creating virtually all the new jobs in this nation.

THE CAUSE OF THE CRISIS

There is, as you know, wide disagreement on the circumstances which led to the current crisis. The main dispute is between the insurance industry and the trial lawyers. The insurance industry lays most of the blame for the situation on the attorneys and the civil justice system. They claim that excessive litigation, overly generous court awards, and greedy attorneys have strained insurance reserves and thus raised the costs of underwriting. While admitting that they underpriced insurance to gain investment capital when interest rates were high, they maintain that tort reform is the answer to the problem.

The attorneys accuse the insurance companies, disclaiming the notion that Americans have become more litigious and that attorneys do little to discourage frivolous lawsuits. They contend that most of the problems are due to poor management of investments made by the insurance companies, and they point to the companies' strong performance in the stock market as evidence of the healthy financial status of the industry as a whole.

Still one other group must be mentioned. State regulators—the insurance commissioners—have done little fingerpointing except at erroneous predictions regarding interest rates, upon which they made many decisions. Although they must operate within statutory limits, they all have authority to review rates either before or after implementation. However, like state tort law, the theory and practice of insurance regulation varies widely from state to state.

INSURANCE INDUSTRY REFORM

Has the market failed? That is the fundamental question many are asking today about the insurance market because its answer has profound public policy implications. The industry itself has blamed the soaring premiums and reductions in cover-

age on previous cut-throat competition, i.e. too much competition among those in the industry. Other experts have argued that there exists a business cycle for insurance; we are currently experiencing the "bust" of the cycle, with better times to follow. There are others who believe the market has failed and offer the solution of increased federal regulation. No consensus has emerged to answer this question.

NFIB believes the market process itself has not failed. We view the current, complex insurance environment as one in which competition within the market has been hindered.

Our membership is generally concerned about the exercise of discretion by insurance companies in cancelling or not renewing policies. *Notification periods are often short, and little if any explanation is given to the policyholder. Claims history seems to have no bearing on an insurer's decision to cancel or not renew. Industrywide cancellations leave insurance agents hard pressed to obtain coverage for clients, and small business owners have neither the time nor the expertise to seek out coverage for themselves.* These are problems which insurance companies must come to grips with and solve. Not resolving these problems will increase the demand for more federal regulation of the industry.

One particular example of current law which hinders effective competition is the antitrust exemption contained within the McCarran-Ferguson Act. NFIB believes that the exemption contained within the law distorts competition in the insurance industry by its very existence.

NO TO NEW FEDERAL AGENCIES OR DEPARTMENTS

While NFIB supports the elimination of the antitrust exemption contained within the McCarran-Ferguson Act, our membership does not support the "federalization" of insurance regulation or the establishment of a new agency or department to oversee the insurance industry. Our members believe in the free market economy and would not want to switch state regulation for federal regulation. We have been encouraged by the recent statements of Federal Trade Commission Chairman Dan Oliver, who has said he would like to investigate the business of insurance. We believe Chairman Oliver would parallel many of our concerns, pursuing a policy to increase competition so insurance coverage will be more affordable and allow for greater coverage.

CONCLUSION

NFIB would like to see more discussion on lifting the prohibition on the Federal Trade Commission from investigating the "business of insurance." Attempts to emphasize pro-competitive policies in FTC studies should benefit both those who offer insurance and those who purchase it. Furthermore, this testimony would not be complete without requesting that Senators look at the other areas involved in a comprehensive solution Members of this subcommittee should make tort reform, a uniform product liability within this testimony high priorities.

In the end, only through a comprehensive view of the insurance crisis will we see insurance costs become reasonable and necessary coverage become available.

FEDERAL TRADE COMMISSION,
Washington, DC, March 20, 1987.

Hon. JOHN MCCAIN,
U.S. Senate,
Washington, DC.

DEAR SENATOR MCCAIN: At the recent hearing before the Senate Committee on Commerce, Science, and Transportation you expressed concern about the increasing volume of counterfeit arts, crafts, and jewelry that is being sold as native American products, exacerbating the poor economic conditions of the Indian economy. You asked what steps I was taking to ensure that the counterfeiting problem was addressed.

When I responded I indicated the agency had published a brochure that informed consumers about ways to distinguish fake native American products from genuine ones. I have looked into the matter further, however, and would like to elaborate on my answer.

In preparing the consumer brochure, "Buying Native American Jewelry," our writer interviewed the president of the Indian Arts and Crafts Association, Lionel McKenny, who, with key members of the Association, assisted in reviewing the piece for accuracy. In addition, an FTC attorney who is a jewelry specialist participated in the review to ensure we provided consumers with the most helpful information. This brochure focuses on native American jewelry because it is frequently imitated, but it also addresses the issue of misrepresented native American handicrafts generally.

The FTC distributed copies of the brochure to its mailing lists of intermediaries, which includes reporters, state and local enforcement agencies, national consumer and business organizations, educators, and libraries. These intermediaries inform their constituencies about such available material. As a result, the FTC distributed 25,000 copies of the brochure over the past year. In addition, to ensure the fullest possible dissemination, the Indian Arts and Crafts Association sent copies to all their member stores in the Southwest for point-of-sale distribution. For your information, I have enclosed copies of the consumer brochure and our press advisory on the subject.

We view this brochure as an important part of our efforts in combatting this problem. Consumers who are educated about this subject, and who know how to identify imitation or counterfeit jewelry and other handicrafts, can protect themselves from unscrupulous dealers. Moreover, informed consumers are in the best position to eliminate this form of deception because they will not purchase fake items.

Our efforts in this area have also, of course, included investigating complaints that we receive. Over the past year, the staff received several complaints about native American counterfeit jewelry, which were resolved on an informal basis. In resolving one Indian jewelry case, the mail order marketer offered purchasers the choice of either returning the counterfeit jewelry for full credit, or keeping the jewelry and receiving a refund of 40 percent of the purchase price. The value of the settlement, depending on the option chosen, ranged from $30,000 to $87,000.

In addition to preparing and distributing the brochure on "Buying Native American Jewelry," and investigating complaints, the FTC staff has contributed to the Department of Commerce's "Study of Problems and Possible Remedies Concerning Imported Native American Style Jewelry and Handicrafts." This study, which was transmitted to the Committee on Energy and Commerce of the U.S. House of Representatives, on July 15, 1985, examines the scope of the problem and the available remedies to the problem. I am enclosing a copy of the study for your information.

We intend to continue our efforts in this area, and we welcome any information or specific complaints that you may have received. Our efforts in this area are greatly assisted by information that knowledgeable individuals can provide, and consumer complaints. Please let me know if my staff or I could provide you any additional information.

Sincerely,

DANIEL OLIVER, *Chairman.*

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